

ADOPTIONS

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This benchguide covers the procedures for terminating the birth parents' right to custody of a child and for freeing the child for adoption. It covers independent, stepparent, and agency adoptions of unmarried minors, as well as adoptions of married minors and adults. It briefly discusses the special procedures that apply in interstate adoptions, intercountry adoptions, adoptions of Native American children, surrogacy adoptions, and coparent adoptions. It contains procedural checklists for the different types of adoptions and proceedings to terminate parental rights. It also contains a summary of the applicable law.

II. PROCEDURAL CHECKLISTS

A. [§130.2] Checklist: Termination of Noncustodial Parent's Rights for Willful Failure To Communicate and Support

(1) *Confirm that the petitioner has served the noncustodial parent with a copy of the petition (mandatory Judicial Council form ADOPT-200) and a citation directing the noncustodial parent to appear at the hearing on the adoption petition.* Service must be made in the manner provided by law for the service of a summons. See [Fam C §8604\(b\)](#).

(2) *Determine any request by the noncustodial parent for the appointment of counsel.* The judge must appoint counsel on a showing of indigence. *In re Jay R.* (1983) 150 CA3d 251, 260–265, 197 CR 672.

(3) *At the hearing, determine whether the grounds for dispensing with the noncustodial parent's consent to the adoption have been shown, i.e., has the noncustodial parent willfully failed to communicate with and pay support for the child for a period of one year when able to do so?* See [Fam C §8604\(b\)](#). The judge need not find an intent to abandon, but must find both a willful failure to support and communicate before entering an order terminating the noncustodial parent's parental rights. *Adoption of Christopher S.* (1987) 197 CA3d 433, 441 n6, 242 CR 866. On factors to consider, see [§130.15](#).

B. [§130.3] Checklist: Natural Father's Action To Establish Parental Rights

(1) *Confirm that the father's action to establish his parental rights has been timely filed.* A man who is not a presumed father may bring an

action for the purpose of obtaining a declaration that he is the child's natural father. [Fam C §7631](#). The action must be filed within 30 days after the birth of the child or after the father receives notice that he is or could be the child's father, whichever is later. See [Fam C §7631](#). A presumed father may bring an action at any time for purposes of obtaining a declaration that he is the child's father. See [Fam C §7630\(a\)\(1\)](#), (b). The action in either case may be filed before the child's birth. [Fam C §7633](#). On presumptions regarding paternity, see [§§130.51–130.54](#).

(2) *Ascertain whether a declaration of paternity has been executed regarding the child.* On the effect of such a declaration, see [§130.52](#).

(3) *If the child is a party to the action, appoint a guardian ad litem to represent the child.* A guardian ad litem who is a relative of the child need not be represented by counsel. [Fam C §7635\(a\)](#). On when the child must be made a party to the action, see [§130.22](#).

(4) *If the mother and any other men alleged to be the child's presumed father or the child's natural father are parties to the action, determine the appropriate alignment of the parties.* See [Fam C §7635\(c\)](#).

(5) *If the father's action is brought under [Fam C §7630\(c\)](#) because the child does not have a presumed father, consolidate this action with any proceeding to terminate the father's parental rights filed under [Fam C §7662](#).* If the 7662 proceeding is filed in another court, transfer the action to that court, unless the judge finds by clear and convincing evidence that a transfer poses a substantial hardship to petitioner. [Fam C §7630\(d\)](#).

Note: Mere inconvenience is not enough to find substantial hardship. [Fam C §7630\(d\)](#).

(6) *If the father's action is brought under [Fam C §7631](#) because the child has a presumed father, suspend all further action in the adoption proceeding until a judgment in the father's action is final.* See [Fam C §7631](#).

(7) *Conduct the hearing in closed court, without admitting any persons who are not necessary to the action.* See [Fam C §7643\(a\)](#). At the hearing, make the following determinations:

- *Is the claimant, in fact, the child's father?* See [Fam C §7664\(b\)](#).
- *If so, is the child an Indian child?* If the child is an Indian child, proceed according to the evidentiary standards and placement preferences of the [Indian Child Welfare Act](#). See [25 USC §§1901 et seq](#); [Welf & I C §§224.6, 361.31, 361.7](#); discussion in [§§130.105–130.112](#).
- *If so, is it in the child's best interest for the father to retain his parental rights or for the adoption to proceed?* In making this

determination, the judge may consider all relevant evidence, including the father's efforts to obtain custody, the child's age and prior placement, and the effects on the child of a change in placement. The necessary findings required by [Fam C §3041](#) in order to award custody to a nonparent over the objection of a parent do not apply, except for a case involving an Indian child. [Fam C §§3041\(e\), 7664\(b\)](#).

(8) *Determine whether the father is entitled to the constitutional protections afforded by Adoption of Kelsey S.* On the factors to consider, see [§130.20](#). A judge may terminate the parental rights of a father who is entitled to these protections only on a showing by clear and convincing evidence of the father's unfitness as a parent, not on a showing of the child's best interest. *Adoption of Kelsey S. (1992) 1 C4th 816, 848–851, 4 CR2d 615.*

(9) *At the conclusion of the hearing, issue one of the following orders:*

- *On finding that it is in the child's best interest for the father to retain his parental rights, issue an order that the father's consent is necessary for an adoption.* See [Fam C §7664\(b\)](#).
- *On finding that the claimant is not the father, or that if he is the father, it is in the child's best interest that the adoption proceed, issue an order that the claimant's consent is not required for an adoption.* This finding terminates the purported father's rights and responsibilities with respect to the child. [Fam C §7664\(b\)](#).
- *On finding that the father is entitled to the protections afforded by Adoption of Kelsey S., and that he is not an unfit parent, issue an order that the father's consent is necessary for an adoption.* See [§130.23](#).
- *On finding that the father is entitled to the protections afforded by Adoption of Kelsey S., but that he is an unfit parent, issue an order that the father's consent is not required for an adoption.* See [§130.23](#).

The order may contain provisions regarding support, custody and guardianship, visitation, and any other matters in the child's best interest. It may also direct the father to pay the reasonable expenses of the mother's pregnancy and confinement. [Fam C §7637](#). The judge may also order that reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs, be paid by the parties as the judge determines. [Fam C §7640](#). The judge has continuing jurisdiction to modify the order. [Fam C §7642](#).

C. [§130.4] Checklist: Proceeding To Terminate Natural Father's Parental Rights

(1) *Set the petition to terminate the parental rights of an alleged natural father for hearing within 45 days after it is filed and service has been completed (or an order has been entered dispensing with notice).* See [Fam C §7667\(a\)](#).

(2) *Rule on any request to continue the hearing date.* The judge may continue the hearing for up to 30 days, as necessary, to allow for the appointment of counsel and to enable counsel to prepare for the hearing, or for other good cause. [Fam C §7668\(a\)](#).

(3) *If the alleged natural father has filed an action to establish his parental rights under [Fam C §7630\(c\)](#), consolidate this action with the proceeding to terminate the father's parental rights. [Fam C §7630\(d\)](#).* If the 7662 proceeding is filed in another court, transfer the action to that court unless the judge finds by clear and convincing evidence that a transfer poses a substantial hardship to petitioner. [Fam C §7630\(d\)](#).

Note: Mere inconvenience is not enough to find substantial hardship. [Fam C §7630\(d\)](#).

(4) *Confirm that the petitioner has given notice of the proceeding to each person identified as the natural father or possible natural father of the child, and that proof of service has been filed.* Notice must be given in accordance with the methods for service of process provided in the Code of Civil Procedure. [Fam C §7666\(a\)](#). A judge may issue an order dispensing with notice to a person who cannot be located. [Fam C §7666\(b\)](#).

(5) *Ascertain whether a declaration of paternity has been executed regarding the child.* On the effect of such a declaration, see [§130.52](#).

(6) *Issue one of the following (see [§130.34](#)):*

- *An order terminating the unknown natural father's parental rights with respect to the child if, after inquiry, the judge is unable to identify the natural father or any possible natural father, and no person has appeared claiming to be the natural father and claiming custodial rights.* See [Fam C §7665](#).
- *An order terminating the parental rights of a natural father who either fails to appear at the hearing on the petition, or appears but does not claim parental rights.* See [Fam C §7664\(a\)](#).
- *An order that the father's consent is necessary for an adoption if the father claims parental rights and the judge finds that it is in the child's best interest for the father to retain his parental rights.* See [Fam C §7664\(b\)](#).

- *An order that the father's consent is not required for an adoption if the father claims parental rights but the judge finds that it is in the child's best interest that the adoption proceed.* This finding terminates the father's rights and responsibilities with respect to the child. [Fam C §7664\(b\)](#). A judge may not terminate the parental rights of a father who has promptly come forward and demonstrated a full commitment to his parental responsibilities except on a showing by clear and convincing evidence that the father is unfit to be a parent. See *Adoption of Kelsey S.* (1992) 1 C4th 816, 848–851, 4 CR2d 615; discussion in §§130.36–130.43.

D. [§130.5] Checklist: Proceeding To Declare Child Free From Parental Custody and Control

(1) *Confirm that the following documents have been filed with the court:*

- *A petition for an order declaring the child free from the custody and control of either or both parents that meets the statutory requirements.* See [Fam C §§7840\(a\), 7841, 7845](#); discussion in §§130.37–130.38.
- *Proof of service of a citation on the person having custody of the child, and on the child's parents or other specified relatives if the parents' residence is unknown, directing them to appear at the hearing on the petition.* [Fam C §§7880\(a\), 7881\(a\)–\(b\)](#). Service must be made in the manner provided by law for the service of a summons, at least ten days before the hearing. See [Fam C §§7880\(c\), 7881\(c\)–\(d\)](#). If the parents cannot with reasonable diligence be served in this manner, the judge may order service by publication. See [Fam C §7882](#); discussion in §130.38.
- *The report and recommendation of the officer, social worker, therapist, or agency investigating the proposed termination of parental rights.* See [Fam C §§7850, 7851\(a\)](#). The judge must receive this report in evidence and consider its contents in rendering a judgment. [Fam C §7851\(d\)](#). See discussion in §130.39.

(2) *Determine whether the child's interests require the appointment of counsel.* See [Fam C §7861](#). On factors to consider, see §130.40.

(3) *Appoint counsel for an indigent parent appearing without counsel, unless the parent waives the right to counsel.* See [Fam C §7862](#). The judge may not appoint the same counsel to represent both the child and the parent. [Fam C §7860](#). See discussion in §130.40.

(4) *Set the petition for hearing within 45 days after it is filed and served.* See [Fam C §7870\(b\)](#).

(5) *Rule on any request to continue the hearing date.* The judge may continue the hearing for up to 30 days to allow for the appointment of counsel (see Fam C §7864) or for other good cause (see Fam C §7871). Fam C §7870(c).

(6) *At the hearing,*

- *Exclude the public, unless the child or the parent (or guardian) requests a public hearing.* See Fam C §7884(a). The judge may, however, admit any persons the judge determines have a direct and legitimate interest in the case or the work of the court. Fam C §7884(b).
- *Receive in evidence the report of the investigating officer or agency.* See Fam C §7851(d); discussion in §130.39.
- *Determine if the petitioner has shown, by clear and convincing evidence, one or more of the grounds for terminating parental rights.* See Fam C §§7821–7828; discussion in §130.37.
- *Consider the child’s wishes, keeping in mind the child’s age.* See Fam C §7890.
- *Determine if the child’s testimony should be taken in chambers, outside the presence of the child’s parents.* See Fam C §7892; discussion in §130.42.
- *Consider the child’s best interests.* See Fam C §7890; discussion in §130.43. The judge must also consider whether termination of parental rights is the least detrimental alternative available to protect the child’s welfare. *In re Jasmon O.* (1994) 8 C4th 398, 426–427, 33 CR2d 85.
- *Determine the amount of compensation to be paid to counsel appointed to represent a parent.* See Fam C §7863; discussion in §130.40.

(7) *If finding that one or more grounds for termination of parental rights has been proved by clear and convincing evidence and that the termination is in the child’s best interests, issue a judgment declaring the child free from the parents’ custody and control.* See Fam C §7894; discussion in §130.44.

E. [§130.6] Checklist: Independent Adoption of Minor

(1) *Confirm that court has jurisdiction over adoption proceeding.* See Fam C §§9210–9212.

(2) *Confirm that the following documents have been filed with the court:*

- *An adoption request on Judicial Council form ADOPT-200 (adopted for mandatory use by all courts).* See [Fam C §8802](#); discussion in [§130.70](#).
- *A consent to dual representation if the attorney is representing both the prospective adoptive parents and the birth parents.* See [Fam C §8800](#); discussion in [§130.64](#).
- *An adoptive placement agreement signed by one or both birth parents, by each prospective adoptive parent, and by the adoption service provider.* See [Fam C §8801.3](#); discussion in [§130.65](#).
- *An adoption agreement on mandatory Judicial Council form ADOPT-210, which includes a consent to the adoption to be signed by the child if over 12 years of age.* See [Fam C §8602](#).

Caution: If an Indian child is being adopted, the [Indian Child Welfare Act](#) (ICWA) will apply. Confirm that mandatory Judicial Council form ADOPT-220 is filed and, if parents have agreed to voluntarily terminate parental rights, that mandatory Judicial Council form ADOPT-225 is filed. Confirm also that the notices on Judicial Council form ADOPT-226 are mailed out to the required parties. The child’s Indian status need not be certain or conclusive for this notice requirement to be triggered. *In re Kahlen W.* (1991) 233 CA3d 1414, 1422, 285 CR 507; see [§§130.105–130.112](#).

- *A consent to the adoption signed by a birth parent who has not signed the adoption placement agreement, unless this parent’s parental rights have been terminated or an exception to the consent requirement applies.* See [Fam C §8814](#). If this birth parent refuses to give the required consent, the judge must order the child restored to the birth parent’s custody. See [Fam C §8804\(c\)](#); discussion in [§130.66](#).
- *Mandatory Judicial Council form ADOPT-310 if a postadoption contact agreement has been made.* [Fam C §8802\(a\)\(3\)](#). See [§130.92](#)
- *A consent to the adoption by the Department of Social Services (DSS) or the delegated county adoption agency if the consent of the birth parent or parents is not necessary.* See [Fam C §8816](#). A judge may grant the adoption petition without the consent of the DSS or the agency if the judge concludes that the child’s welfare will be promoted by the adoption. See [Fam C §8820\(c\)](#); discussion in [§130.67](#).
- *An accounting report of all disbursements that the petitioners have made or agreed to make in connection with the adoption, executed*

by the petitioners under penalty of perjury. See [Fam C §8610](#); discussion in [§130.57](#).

- *The report and recommendation of the DSS or the agency regarding the proposed adoption.* See [Fam C §8807](#).

(3) *Determine any petition or motion for the appointment of an attorney to represent a birth parent.* A judge may also make such an appointment on his or her own motion. See [Fam C §8800\(e\)](#); discussion in [§130.64](#).

(4) *Consolidate the adoption proceeding with any guardianship proceeding involving the child.* Consolidation of the two proceedings is required by statute. The consolidated case must be heard and decided in the court in which the adoption is pending. See [Fam C §8802\(d\)](#); discussion in [§130.58](#).

(5) *Order the child restored to the birth parents' custody if they revoke their consent to the adoption within 30 days after signing the adoption placement agreement (or consent) and have not also signed a waiver of the right to revoke consent.* See [Fam C §8814.5](#); discussion in [§§130.68–130.69](#).

(6) *If the petitioners move to withdraw or dismiss the adoption petition, determine whether the child should be returned to the birth parents or committed to the care of the DSS or the delegated county adoption agency for the purpose of arranging an adoptive placement or of making a suitable plan for the child.* The judge may retain jurisdiction over the child to make any order for the child's custody that the judge deems to be in the child's best interest. See [Fam C §§8804–8805](#); discussion in [§130.71](#).

(7) *Determine any request to remove the child from the county during the pendency of the adoption proceeding.* See [Fam C §8803](#); discussion in [§130.72](#).

(8) *Set the petition for hearing.* On conducting the hearing, see [§130.56](#). If the DSS or the delegated county adoption agency recommends that the petition be denied, the judge is not required to follow this recommendation and may grant the petition if the judge finds that the adoption is in the child's best interests, except when the required consents have not been obtained. See [Fam C §8822](#); *Adoption of McDonald* (1954) 43 C2d 447, 456–457, 274 P2d 860; discussion in [§130.73](#).

(9) *If the petition is granted:*

- *Have the petitioners and child of 12 years or over execute adoption agreement on mandatory Judicial Council form ADOPT-210.* See [Fam C §8612\(b\)](#); discussion in [§130.59](#).

- *Sign adoption order prepared on mandatory Judicial Council form ADOPT-215. See Fam C §§8612(c), 8802(e); discussion in §130.60.*
- *Advise the petitioners of the effect of the adoption, e.g., that they and the child now have the legal relationship of parent and child, with all the rights and duties of that relationship, including inheritance rights. See §130.61.*
- *Determine any request for the payment of the costs and fees of the adoption. See §130.74.*

(10) *If the petition is denied, order the child committed to the care of the DSS or the delegated county adoption agency for the purpose of arranging an adoptive placement or of making a suitable plan. See Fam C §8805; discussion in §130.73.*

F. [§130.7] Checklist: Stepparent and Domestic Partner Adoption of Minor

(1) *Confirm that court has jurisdiction over adoption proceeding. See Fam C §§9210–9212.*

(2) *Confirm that the following documents have been filed with the court:*

- *An adoption request on Judicial Council form ADOPT-200 (adopted for mandatory use by all courts). See Fam C §9000; discussion in §130.76.*
- *An adoption agreement on mandatory Judicial Council form ADOPT-210, which includes a consent to the adoption to be signed by the child if over 12 years of age. See Fam C §8602.*
- *A consent to the adoption signed by both birth parents, unless an exception to the consent requirement applies. See Fam C §§9003–9004. The judge must dismiss the adoption petition if the noncustodial birth parent refuses to give the required consent. See Fam C §9006(b); discussion in §130.78.*
- *Mandatory Judicial Council form ADOPT-310 if a postadoption contact agreement has been made. Fam C §9000(f). See §130.92.*
- *The report and recommendation of the agency investigating the adoption. See Fam C §9001(a); discussion in §130.77.*

Caution: If an Indian child is being adopted, the Indian Child Welfare Act (ICWA) will apply. Confirm that mandatory Judicial Council form ADOPT-220 is filed and, if parents have agreed to voluntarily terminate parental rights, that mandatory Judicial Council form ADOPT-225 is filed. Confirm also that the notices on Judicial Council form ADOPT-226 are

mailed out to the required parties. The child's Indian status need not be certain or conclusive for this notice requirement to be triggered. *In re Kahlen W.* (1991) 233 CA3d 1414, 1422, 285 CR 507; see §130.105–130.112.

- *Stepparent adoption includes adoption by a domestic partner as defined in Fam C §297. Fam C §9000(f)*

(3) *Consolidate the adoption proceeding with any guardianship proceeding involving the child.* Consolidation of the two proceedings is required by statute. See Fam C §9000(d); discussion in §130.58.

(4) *Determine whether a home study should be ordered.* A judge may order a home study on the judge's own motion. See Fam C §9001(b)–(c); discussion in §130.77.

(5) *If the noncustodial birth parent files a motion or petition to withdraw his or her consent to the adoption, determine whether to approve the withdrawal after considering the child's best interests.* See Fam C §9005; discussion in §130.79. The judge must dismiss the adoption proceeding if the judge approves withdrawal of the consent. See Fam C §9005(d).

(6) *Determine any motion by the petitioner to withdraw the petition or dismiss the adoption proceedings.* See Fam C §9006; discussion in §130.80.

(7) *Set the petition for hearing.* On conducting the hearing, see §130.56.

(8) *Determine whether to grant the petition after considering the report and recommendation filed by the investigating agency.* See Fam C §9001(a); discussion in §130.81.

(9) *If the petition is granted:*

- *Have the stepparent and child of 12 years or over execute adoption agreement on mandatory Judicial Council form ADOPT-210.* See Fam C §8612(b); discussion in §130.59.
- *Sign adoption order prepared on mandatory Judicial Council form ADOPT-215.* See Fam C §§8612(c), 9000(e); discussion in §130.60.
- *Advise the petitioner of the effect of the adoption, e.g., that the petitioner and the child now have the legal relationship of parent and child, with all the rights and duties of that relationship, including inheritance rights.* See §130.61.

G. [§130.8] Checklist: Agency Adoption of Minor

(1) *Confirm that court has jurisdiction over adoption proceeding.* See Fam C §§9210–9212.

(2) *Confirm that the following documents have been filed with the court:*

- *An adoption request on Judicial Council form ADOPT-200 (adopted for mandatory use by all courts). See Fam C §§8714–8714.5; discussion in §§130.91–130.94. The Department of Social Services (DSS) or the licensed adoption agency with whom the child has been placed for adoption must join in the petition if it approves and consents to the adoption. See Fam C §8714(d)*
- *An adoption agreement on mandatory Judicial Council form ADOPT-210, which includes a consent to the adoption to be signed by the child if over 12 years of age. See Fam C §8602.*
- *A written statement relinquishing the child for adoption signed by one or both birth parents. See Fam C §8700; discussion in §130.83.*
- *A court order terminating the parental rights of the non-relinquishing parent. See §130.84.*
- *Mandatory Judicial Council form ADOPT-310 if a postadoption contact agreement has been entered into with the birth parent. See Fam C §§8714(c), 8714.5(d), 8912(e); see §130.92.*
- *An accounting report of all disbursements that the petitioners have made or agreed to make in connection with the adoption, executed by the petitioners under penalty of perjury. See Fam C §8610; discussion in §130.57.*
- *The report and recommendation of the DSS or the licensed adoption agency regarding the proposed adoption. See Fam C §8715; discussion in §130.98.*

Caution: If an Indian child is being adopted, the [Indian Child Welfare Act](#) (ICWA) will apply. Confirm that mandatory Judicial Council form ADOPT-220 is filed and, if parents have agreed to voluntarily terminate parental rights, that mandatory Judicial Council form ADOPT-225 is filed. Confirm also that the notices on Judicial Council form ADOPT-226 are mailed out to the required parties. The child’s Indian status need not be certain or conclusive for this notice requirement to be triggered. *In re Kahlen W.* (1991) 233 CA3d 1414, 1422, 285 CR 507; see §§130.105–130.112.

(3) *Consolidate the adoption proceeding with any guardianship proceeding involving the child.* Consolidation of the two proceedings is required by statute. The consolidated case must be heard and decided in the court in which the adoption is pending. See Fam C §§8714(e), 8714.5(f); discussion in §130.58.

(4) *Determine any motion by the petitioners to withdraw the petition or dismiss the adoption proceedings.* See Fam C §8719; discussion in §130.95.

(5) *Determine any request to remove the child from the county during the pendency of the adoption proceeding.* See Fam C §8713; discussion in §130.96.

(6) *Determine any motion by the DSS or the licensed adoption agency to remove the child from the prospective adoptive parents' home.* See Fam C §8704(b); discussion in §130.97.

(7) *Set the petition for hearing.* On conducting the hearing, see §130.38. If the DSS or the licensed adoption agency recommends that the petition be denied, the judge is not required to follow this recommendation and may grant the petition if the judge finds that the adoption is in the child's best interests. See Fam C §8704(b); *Adoption of McDonald* (1954) 43 C2d 447, 457–458, 460, 274 P2d 860; discussion in §130.99. On factors the judge should consider, see §§130.85–130.88.

(8) *If the petition is granted:*

- *Have petitioners and child of 12 years or over execute adoption agreement on mandatory Judicial Council form ADOPT-210.* See Fam C §8612(b); discussion in §130.59.
- *Sign adoption order prepared on mandatory Judicial Council form ADOPT-215.* See Fam C §§8612(c), 8714(f), 8714.5(g); discussion in §130.60.
- *Advise the petitioners of the effect of the adoption, e.g., that they and the child now have the legal relationship of parent and child, with all the rights and duties of that relationship, including inheritance rights.* See §130.61.
- *Determine whether to approve any postadoption contact agreement entered into by the adopting relative and the birth parent.* See Fam C §8616.5(a)–(c); discussion in §§130.101–130.102.

H. [§130.9] Checklist: Adoption of Adult or Married Minor

(1) *Confirm that the following documents have been filed with the court:*

- *A petition for adoption that meets the statutory requirements.* See Fam C §9321; discussion in §130.122.
- *The consent to the adoption of the adoptive parent's spouse (see Fam C §9301) and the proposed adoptee's spouse (see Fam C §9302(a)).* See discussion in §130.121.

- *The report and recommendation of the regional center for the developmentally disabled if the prospective adoptive parent is a provider of services to persons with developmental disabilities and the proposed adoptee is an unrelated adult with developmental disabilities.* See Fam C §9327; discussion in §130.123. In all other cases, no investigation or report by any public agency concerning the proposed adoption is required, unless ordered by a judge. See Fam C §9325; discussion in §130.123.

(2) *Set the petition for hearing.* See Fam C §9322. If the proposed adoption is of a developmentally disabled adult, determine if notice of the hearing should be served on specified “interested” persons. See Fam C §9323; discussion in §130.124. On conducting the hearing, see §130.125.

(3) *Grant the petition if satisfied that the adoption is in the best interests of the parties and in the public interest.* See Fam C §9328(b); discussion in §130.125.

III. APPLICABLE LAW

A. General Background

1. [§130.10] Statutory Proceedings

Adoption procedures are entirely statutory. *In re Michael R.* (2006) 137 CA4th 126, 136, 39 CR3d 773; *Adoption of McDonald* (1954) 43 C2d 447, 452, 274 P2d 860; *In re Baby Boy M.* (1990) 221 CA3d 475, 480, 272 CR 27. These procedures are contained in Fam C §§8500–9340. A judge may lack jurisdiction to grant an adoption that does not satisfy statutory requirements. *In re Brittany H.* (1988) 198 CA3d 533, 553, 243 CR 763.

2. [§130.11] Special Proceedings

An adoption proceeding is a special proceeding. *In re Helen J.* (1973) 31 CA3d 238, 244, 107 CR 106. A special proceeding is a type of case that was not, under common law or equity, either an action at law or suit in equity, but instead, a case established by statute. *People v Superior Court (Laff)* (2001) 25 C4th 703, 725, 107 CR2d 323. Provisions of the Code of Civil Procedure governing civil actions do not apply to adoption proceedings, except as they have been made applicable to these proceedings by statute or case law. See, e.g., *In re Baby Girl A.* (1991) 230 CA3d 1611, 1618–1619, 282 CR 105 (judge may permit parties with sufficient interest to intervene in adoption proceeding under CCP §387); *Adoption of Kay C.* (1991) 228 CA3d 741, 751, 278 CR 907 (judge may vacate adoption order under CCP §473(b)); *In re Angela R.* (1989) 212

CA3d 257, 273, 260 CR 612 (default procedures under CCP §§585–587.5 do not apply).

3. [§130.12] Types of Adoptions

There are three main types of adoptions of unmarried minors provided for by statute:

(1) *Independent adoption*, in which the birth parents select the prospective adoptive parents, and neither the DSS nor any licensed adoption agency is a party to, or joins in, the adoption petition. See Fam C §8524; discussion in §§130.63–130.74.

(2) *Stepparent adoption*, in which the spouse of the child's birth parent seeks to adopt the child. See Fam C §8548; discussion in §§130.75–130.81. A registered domestic partner who desires to adopt a child of his or her domestic partner may employ the procedures applicable to stepparent adoptions. See Fam C §9000(b), (f); discussion in §130.114.

(3) *Agency adoption*, in which the child is placed in an adoptive home by the DSS or a licensed adoption agency after the birth parents have relinquished their right to the child or their parental rights have been terminated by court order. See Fam C §8506; discussion in §§130.82–130.102.

Special statutory procedures apply to interstate adoptions (see §130.103), intercountry adoptions (see §130.104), and adoptions of Native American children (see §§130.105–130.112).

In addition, there are statutory procedures for adopting married minors and adults. See §§130.120–130.127.

There are no statutory procedures specifically addressing surrogate and coparent adoptions. Case law has provided guidance for determining the issues involved in these types of cases. See §§130.113, 130.115–130.117.

4. [§130.13] Equitable Adoption Doctrine

Although adoption procedures are entirely statutory (see §130.10), a judicially developed doctrine of *equitable adoption* has been applied in certain limited circumstances. The doctrine allows a person who was accepted and treated as a natural or adopted child, and as to whom adoption was promised or contemplated but never performed, to share in inheriting the property of the equitable “parent.” *Estate of Ford* (2004) 32 C4th 160, 165, 8 CR3d 541. A judge may enforce an agreement to adopt an individual under this doctrine in order to protect that individual's inheritance rights. A judge may find an equitable adoption on a showing of (a) an oral, express agreement to adopt, (b) subsequent conduct by the parties indicating their recognition of a parent-child relationship, and (c) the parties' capacity to contract. See Prob C §6455; *Estate of Cleveland*

(1993) 17 CA4th 1700, 1713 n15, 22 CR2d 590; *Marriage of Lewis & Goetz* (1988) 203 CA3d 514, 250 CR 30 (applying doctrine).

Although California decisions have explained equitable adoption as the specific enforcement of a contract to adopt, the doctrine rests less on ordinary rules of contract law than on considerations of fairness and intent. *Estate of Ford, supra*, 32 C4th at 169. The equitable adoption claimant must demonstrate the existence of a direct expression by the decedent of an intent to adopt the claimant. This intent may be shown by proof of an unperformed express agreement or promise to adopt. It may also be shown by proof of other acts or statements directly showing that the decedent intended the claimant to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt, the decedent's statement of his or her intent to adopt, or the decedent's representation to the claimant or the community at large that the claimant was the decedent's natural or legally adopted child. 32 C4th at 171. In addition to a statement or act by the decedent that unequivocally shows the decedent's intent to adopt, the claimant must show that the decedent acted consistently with that intent by forming with the claimant a close and enduring family relationship that must persist up to, or at least not be repudiated by the decedent before, the decedent's death. These elements of an equitable adoption must be shown by clear and convincing evidence. 32 C4th at 171–172.

B. Termination of Parental Rights

1. [§130.14] Proceedings To Terminate Parental Rights—In General

There are seven procedures by which a minor child may be freed for adoption. Two of these procedures are voluntary:

- The birth parents relinquish the child to a licensed adoption agency for placement. See [Fam C §§8606\(d\)–\(e\)](#), 8700; discussion in [§130.83](#).
- The birth parents consent to an independent (see [§§130.65–130.66](#)) or stepparent (see [§130.78](#)) adoption.

Five of the procedures involve the involuntary termination of parental rights by

(1) A judge's determination in the adoption proceeding that the noncustodial parent's consent to the adoption is not required because this parent has, for a period of one year, willfully failed to communicate with and to support the child although able to do so, made only token efforts to support or communicate with the child (see [Fam C §8604\(b\)–\(c\)](#)), or has deserted the child without providing for identification of the child (see [Fam C §8606\(c\)](#)). See discussion in [§§130.15–130.18](#).

(2) A proceeding under the [Uniform Parentage Act](#) ([Fam C §§7600–7730](#)) in which a judge determines that a pending adoption is in the child’s best interests and terminates the parental rights and responsibilities of the child’s natural father, who came forward to claim parental rights during the adoption proceeding, and orders that the father’s consent to the adoption is not required. See [Fam C §7664\(b\)](#); discussion in [§§130.19–130.34](#).

(3) A proceeding under [Fam C §§7800–7895](#) to declare the child free from the parental custody and control of the child’s birth mother and presumed father. See [§§130.35–130.44](#).

(4) A proceeding in an existing guardianship proceeding to declare the child free from the custody and control of one or both parents. The proceeding is brought pursuant to [Fam C §§7800–7895](#) (see (3) above). [Prob C §1516.5](#). See [§§130.45–130.46](#).

(5) A juvenile court proceeding to terminate the parental rights of parents of a dependent child of the juvenile court under [Welf & I C §366.26](#). This proceeding is covered in California Judges Benchguide 104: *Juvenile Court Dependency Selection and Implementation Hearing* (Cal CJER).

Because parental consent is a jurisdictional prerequisite to an adoption, when one parent refuses to give this consent, his or her parental rights must be terminated by one of these procedures before an adoption may be granted.

A child who has been freed for adoption under the law of another jurisdiction may be adopted in California without the birth parents’ consent. See [Fam C §8606\(a\)–\(b\)](#).

Special requirements apply if a proceeding to terminate parental rights involves a Native American child. See [§130.109](#).

2. Termination by Willful Failure To Communicate With and Support Child

a. [§130.15](#) Grounds

If one birth parent has been awarded custody of the child by a court order or has custody by agreement of both parents, and the noncustodial parent willfully fails to communicate with and to pay for the support of the child for a period of one year when able to do so, then the noncustodial parent’s consent to the adoption is not necessary. [Fam C §8604\(b\)](#). This provision does not apply if both parents have joint legal and physical custody of the child. See *In re Allison H.* (1991) 230 CA3d 154, 158–159, 281 CR 178. The court, in determining whether a parent has willfully failed to communicate or support the child, may disregard token efforts by the parent. [Fam C §8604\(c\)](#).

This is a different standard than that applied in a proceeding to terminate parental rights under [Fam C §7822](#). Under that section, a judge may terminate a noncustodial parent's rights to the child only on proof by clear and convincing evidence (see [Fam C §7821](#)) that the parent has failed to support *or* communicate with the child for one year, *with the intent to abandon the child*. See [§130.37](#). No finding of an intent to abandon the child is required in a [Fam C §8604\(b\)](#) proceeding (*Marriage of Dunmore* (2000) 83 CA4th 1, 4–5, 98 CR2d 885), but *both* a willful failure to support *and* communicate must be shown. *Adoption of Christopher S.* (1987) 197 CA3d 433, 441 n6, 242 CR 866; *Adoption of Murray* (1978) 86 CA3d 222, 224–225, 150 CR 58 (father's rights could not be terminated when, although he had willfully failed to support the child for one year, he had not willfully failed to communicate with the child and had in fact visited the child repeatedly). A judge's order under [Fam C §8604](#) permitting an adoption to proceed without the noncustodial parent's consent does not relieve that parent from the obligation to pay child support. This obligation terminates only when the adoption is completed. *Marriage of Dunmore*, *supra*, 83 CA4th at 4–5.

b. [§130.16] Citation

The petitioner (*i.e.*, the prospective adoptive parent) must serve the noncustodial parent with a copy of a citation that requires the noncustodial parent to appear at the hearing on the adoption petition. See [Fam C §8604\(b\)](#). Service must be made in the manner provided by law for the service of a summons. [Fam C §8604\(b\)](#). The noncustodial parent must be informed of the specific factual allegations showing a willful failure to communicate and support. *In re Jay R.* (1983) 150 CA3d 251, 260, 197 CR 672. This may be accomplished by attaching a copy of the petition to the citation. A citation that simply orders the noncustodial parent to appear, without any recitation of the issues he or she must meet, is not an adequate notice. 150 CA3d at 260.

c. [§130.17] Appointment of Counsel

The judge must appoint counsel for the noncustodial parent on his or her request and a showing of indigence. *In re Jay R.* (1983) 150 CA3d 251, 260–265, 197 CR 672.

d. [§130.18] Evidentiary Considerations

Statutory presumption. The noncustodial parent's failure to communicate with the child *or* to pay for the support of the child for a period of one year is prima facie evidence that the failure was willful and without lawful excuse. [Fam C §8604\(c\)](#). Token efforts to support or

communicate with the child may be disregarded by the trial court. [Fam C §8604\(c\)](#). This provision does not alter the requirement of [Fam C §8604\(b\)](#) that both a willful failure to communicate and to pay support must be shown before an adoption may be granted without the noncustodial parent's consent. Instead, [Fam C §8604\(c\)](#) creates a presumption that a failure either to support or communicate for one year is prima facie evidence that the failure was willful. *Adoption of Murray* (1978) 86 CA3d 222, 225, 150 CR 58.

Burden of proof. The noncustodial parent has the burden of proving that he or she did not willfully fail to provide for, or communicate with, the child, or was unable to do so. *In re Jay R.* (1983) 150 CA3d 251, 263, 197 CR 672. Frequently the noncustodial parent will claim that the custodial parent has concealed the child. In such a case, the noncustodial parent must show acts of concealment by the custodial parent and reasonable efforts by the noncustodial parent to find the child, *e.g.*, inquiries made of relatives, friends, and neighbors who might know of the child's whereabouts, and a check of public records to determine the child's whereabouts.

Showing of "willfulness." In determining whether the noncustodial parent's failure to communicate or provide support was "willful," a judge may consider a combination of factors, such as illness, remarriage, other children, and financial difficulties. See *Adoption of Smith* (1969) 270 CA2d 605, 609, 75 CR 900. This parent's willful failure to pay support for one year is not cured by a subsequent involuntary payment of support arrearages. *Adoption of Van Anda* (1976) 62 CA3d 189, 193-194, 132 CR 878. The noncustodial parent's incarceration may, however, preclude a finding of willful neglect. *In re Jay R.*, *supra*, 150 CA3d at 263.

Relevant time period. The "year" in question is not limited to the year immediately preceding the filing of the adoption petition. *In re Jay R.*, *supra*, 150 CA3d at 263. The judge may consider a willful failure to communicate and support during a more remote period, particularly if that period is followed by one during which there is a continued failure to support even if not willful. See *Adoption of Christopher S.* (1987) 197 CA3d 433, 440-441, 242 CR 866. A judge may consider evidence of past delinquency to be irrelevant because of remoteness in time if evidence of more recent proper parental conduct is presented. See *Adoption of Coffee* (1976) 59 CA3d 593, 598 n5, 130 CR 887.

3. Proceedings Under Uniform Parentage Act (Fam C §§7600–7730)

a. [§130.19] Natural Father's Action To Establish Legal Status as Child's Father

The Uniform Parentage Act (UPA) creates three classifications of parents: mothers; presumed fathers; and biological fathers who are not presumed fathers, who are referred to as natural fathers. Fam C §§7600, 7611; *In re Liam L.* (2000) 84 CA4th 739, 745, 101 CR2d 13. A child may have more than one presumed father, but only one biological father. *Adoption of Kelsey S.* (1992) 1 C4th 816, 825, 4 CR2d 615. Under the UPA, an unwed father's rights with respect to the adoption of his child depend on whether he is a presumed father or a natural father. *Adoption of Michael H.* (1995) 10 C4th 1043, 1050–1051, 43 CR2d 445; *In re Kyle F.* (2003) 112 CA4th 538, 542, 5 CR3d 190. The UPA gives a presumed father statutory rights comparable to those given to a mother. See Fam C §§7600, 7661; 112 CA4th at 542. A natural father, on the other hand, is afforded far fewer rights under the UPA. *Adoption of Kelsey S.*, *supra*, 1 C4th at 824–825.

“Presumed father” status. A “presumed father” must be given notice of the adoption proceeding, and the child cannot be adopted without the presumed father's consent unless his rights have been formally terminated, e.g., under Fam C §§7800–7895 (see §§130.35–130.44) or Fam C §8604(b) (see §§130.15–130.18). See Fam C §§7660, 8604(a), 8606; *In re Baby Girl M.* (1984) 37 C3d 65, 71–72, 207 CR 309; *Adoption of Michael D.* (1989) 209 CA3d 122, 130, 256 CR 884. A presumed father, whether a biological father or not, has a statutory right to veto an adoption by withholding his consent in the absence of a showing by clear and convincing evidence that he is an unfit parent. *Adoption of Kelsey S.*, *supra*, 1 C4th at 824–825; *In re Kyle F.*, *supra*, 112 CA4th at 542. Thus, if a man is a presumed father, a third party generally cannot adopt his child unless both he and the mother consent, regardless of whether the adoption might be in the child's best interest. *Adoption of Michael H.*, *supra*, 10 C4th at 1051; *Adoption of Kelsey S.*, *supra*, 1 C4th at 825. But see *In re Guardianship of Ann S.* (2009) 45 C4th 1110, 1118, 90 CR3d 701; *In re Charlotte D.* (2009) 45 C4th 1140, 1147, 90 CR3d 724 (consent not required in probate guardianship if child has been in guardianship for two years and guardian wants to adopt).

Notwithstanding any other provision of law, a presumed father may waive the right to notice of any adoption proceeding by executing a department form before an authorized representative of the department, an authorized representative of a licensed public or private adoption agency, or a notary public or other person authorized to perform notarial acts. The

waiver of notice form may be validly executed before or after the birth of the child, and once signed no notice, relinquishment for, or consent to adoption of the child is required from the father for the adoption to proceed. This must be a voluntary and informed waiver without undue influence. [Fam C §7660.5](#). If the waiver is executed, consent of the presumed father is not needed.

In general, a “presumed father” is a man who has legally married or attempted to legally marry the child’s mother, or who has received the child into his home and openly holds out the child as his natural child. See [Fam C §7611](#); *Adoption of Michael H.*, *supra*, 10 C4th at 1051; *In re Kyle F.*, *supra*, 112 CA4th at 542. [Family Code §7611](#) establishes the exclusive means for an unwed father to establish presumed father status. *In re Zacharia D.* (1993) 6 C4th 435, 449, 24 CR2d 751. On presumptions of paternity, see [§§130.51–130.54](#). A voluntary declaration of paternity that complies with the statutory requirements also confers on the declarant presumed father status. *In re Raphael P.* (2002) 97 CA4th 716, 722–723, 118 CR2d 610; *In re Liam L.* (2000) 84 CA4th 739, 743–746, 101 CR2d 13; see [§130.52](#). A voluntary declaration of parentage executed in a state outside of California is constitutionally entitled to full recognition by California courts. *In re Mary G.* (2007) 151 CA4th 184, 199–200, 59 CR3d 703. For the loss of presumed father status if the presumptions are overcome, see [§130.54](#).

“*Natural father*” status. A man who is not a “presumed father” must bring an action under the UPA for a judicial declaration that he is the child’s “natural father” in order to obtain the right to block an adoption by withholding his consent. See [Fam C §§7630\(c\)](#) (action when child has no presumed father), [7631](#) (action when child has presumed father); *Adoption of Michael H.*, *supra*, 10 C4th at 1051; *Adoption of Alexander M.* (2001) 94 CA4th 430, 438, 114 CR2d 218.

A “natural father” is a man who is the child’s biological father, but who does not qualify as a “presumed father” under any of the statutory presumptions of paternity. See [22 Cal Code Regs §35000\(a\)\(9\)](#); *Adoption of Kelsey S.*, *supra*, 1 C4th at 823 n3; *In re Baby Girl M.*, *supra*, 37 C3d at 72 n5; *In re A.A.* (2003) 114 CA4th 771, 779, 7 CR3d 755 (“natural father” means that although a man’s biological paternity has been established, he has not achieved presumed father status). Even if the father files such an action, the adoption may proceed over his objection if either the mother or the party seeking to adopt the child successfully petitions for termination of his parental status under [Fam C §7662](#). *Adoption of Michael H.*, *supra*, 10 C4th at 1051; discussion in [§§130.28–130.34](#). In general, a biological father who is not a presumed father has no statutory right to block an adoption unless he first proves in an action under the UPA that it is in the child’s best interest that the adoption not proceed.

[Fam C §7664\(b\)](#); *Adoption of Michael H.*, *supra*, 10 C4th at 1051–1052; *Adoption of Kelsey S.*, *supra*, 1 C4th at 824 (child’s best interest is sole criterion when there is no presumed father); *Adoption of Alexander M.*, *supra*, 94 CA4th at 438; discussion in §§130.23–130.27. Certain constitutional protections, however, are afforded a natural father who has come forward promptly and demonstrated a full commitment to his parental responsibilities. See discussion in §130.20.

(1) [§130.20] Rights of Natural Father

Constitutional protections. A natural father who has no statutory right to block a third party adoption by withholding his consent may have a constitutional right to do so under the due process and equal protection clauses of the [Fourteenth Amendment](#). *Adoption of Michael H.* (1995) 10 C4th 1043, 1051–1052, 43 CR2d 445; *In re Kyle F.* (2003) 112 CA4th 538, 542, 5 CR3d 190. If a natural father comes forward promptly and demonstrates a full commitment to his parental responsibilities (emotional, financial, and otherwise), his parental rights may not be terminated unless it is shown by clear and convincing evidence that he is an unfit parent. *Adoption of Kelsey S.* (1992) 1 C4th 816, 849, 851, 4 CR2d 615; *Adoption of Daniele G.* (2001) 87 CA4th 1392, 1395, 105 CR2d 341; *In re Julia U.* (1998) 64 CA4th 532, 540–541, 74 CR2d 920; but see *In re Guardianship of Ann S.* (2009) 45 C4th 1110, 1118, 90 CR3d 701; *In re Charlotte D.* (2009) 45 C4th 1140, 1147, 91 CR3d 724 (parental status may be terminated under guardianship provisions if child is in guardianship for two years and guardian wants to adopt. In such a case, the natural father is entitled to the same rights and protections as the mother, and a judge may not terminate the father’s parental rights merely on a showing that it is in the child’s best interest for the adoption to proceed. *Adoption of Kelsey S.*, *supra*, 1 C4th at 848–850.

Consideration of father’s conduct. In determining whether a father is entitled to this constitutional protection, the judge must consider the father’s conduct both before and after the child’s birth; once the father knows, or reasonably should know, of the pregnancy, he must attempt to assume his parental responsibilities promptly, and as fully as the mother will allow and the circumstances permit, and must demonstrate a willingness to assume full custody of the child, not merely to block the adoption. *Adoption of Kelsey S.*, *supra*, 1 C4th at 850; *In re Julia U.*, *supra*, 64 CA4th at 541. The judge should also consider the father’s public acknowledgment of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child. *Adoption of Kelsey S.* *supra*, 1 C4th at 849; *In re Julia U.*, *supra*, 64 CA4th at 541. The mere existence of a biological link between the father and the child does not merit constitutional protection;

the Constitution only protects the parental relationship that an unwed father has actively developed by coming forward to participate in the rearing of his child and acting as a father. *Adoption of Michael H.*, *supra*, 10 C4th at 1052. See *Dawn D. v Superior Court (Jerry K.)* (1998) 17 C4th 932, 942, 72 CR2d 871 (biological father's mere desire to establish personal relationship with child is not fundamental liberty interest protected by due process clause). A father's failure to communicate with and support the mother during pregnancy was not excused by his voluntary criminal conduct that led to his incarceration during pregnancy, coupled with failure to communicate and support after release from incarceration. *Adoption of O.M.* (2009) 169 CA4th 672, 680, 87 CR3d 135.

Timeliness of father's conduct. The father does not have a constitutional right to withhold his consent to an at-birth, third party adoption, unless he promptly demonstrated a full commitment to his parental responsibilities during pregnancy (to the extent allowed by the mother and as permitted by the circumstances), within a short time after he discovered or reasonably should have discovered that the biological mother was pregnant with his child. *Adoption of Michael H.*, *supra*, 10 C4th at 1059–1060. He cannot compensate for his failure to do so by attempting to assume his parental responsibilities months after learning of the pregnancy. 10 C4th at 1054–1055, 1060. See *In re Jesusa V.* (2004) 32 C4th 588, 610–611, 10 CR3d 205 (father who had not executed voluntary declaration of paternity or taken any other steps to formalize his role as child's father before dependency petition was filed had not sufficiently and timely demonstrated full commitment to his parental responsibilities to merit constitutional protection); *In re Ariel H.* (1999) 73 CA4th 70, 73–74, 86 CR2d 125 (father who fails to timely demonstrate full commitment to his parental responsibilities is not entitled to constitutional protection; father is not excused from promptly assuming his parental responsibilities by fact that he is a minor). Moreover, in dependency proceedings, a natural father who comes forward after reunification services have ended bears a burden to show changed circumstances or new evidence that it would be in the child's best interests to provide reunification services, even if paternity was hidden from the natural father by the mother. *In re Vincent M.* (2008) 161 CA4th 943, 955, 74 CR3d 755. Even if a biological father can establish presumed father status, that fact alone is not enough to overcome the judgment of paternity established by a voluntary declaration of paternity by another presumed father. *In re William K.* (2008) 161 CA4th 1, 11–12, 73 CR3d 737.

Limited applicability of constitutional protections. The constitutional rights afforded to a natural father by *Adoption of Kelsey S.* apply only in a proceeding to terminate the father's parental rights; they do not apply to a

proceeding that merely involves custody after a failed adoption. *Guardianship of Zachary H.* (1999) 73 CA4th 51, 62, 86 CR2d 7 (couple with whom child had been living since being placed with them at birth by mother sought guardianship of child after father successfully resisted attempt to terminate his parental rights). Nor does the constitutional right to a finding of unfitness apply to a proceeding in an existing guardianship under Prob C §1516.5 to terminate parental rights and allow adoption by the guardians. *In re Guardianship of Ann S.*, *supra*, 45 C4th 1118; *In re Charlotte D.*, *supra*, 45 C4th at 1146; see §130.46.

The constitutional protections also do not apply when the child was conceived as a result of nonconsensual sexual intercourse. *Adoption of Kelsey S.*, *supra*, 1 C4th at 849 n14. Family Code §7611.5 provides that a man may not be presumed to be the natural father of a child if the child was conceived as a result of an act in violation of Pen C §261 and the father was convicted of that violation; or if the child was conceived as a result of an act in violation of Pen C §261.5, the father was convicted of that violation, and the mother was under 15 years of age and the father was 21 years of age or older at the time of conception. An unwed father, however, should not be denied the constitutional right to develop a parental relationship with his child when he and the mother who is a minor are relatively close in age and both willingly participated in the sexual act that resulted in the child's conception. *In re Kyle F.* (2003) 112 CA4th 538, 544, 5 CR3d 190 (18-year-old father and 16-year-old mother).

(2) [§130.21] Procedures

When child does not have a presumed father. A natural father's action to establish the existence of the father-child relationship is brought under Fam C §7630(c) if the child does not have a presumed father.

If a proceeding has been filed to declare a child free from the custody and control of either or both parents, any action seeking to determine the parent-child relationship of the father must be consolidated and heard by the first court unless there is clear and convincing evidence that a transfer poses a substantial hardship to the petitioner in the paternity action; Fam C §7630(c)–(d); see §§130.28–130.34.

Note: Mere inconvenience is not enough to find substantial hardship. Fam C §7630(d).

When child has a presumed father. The action is brought under Fam C §7631 if the child has a presumed father. See Fam C §7631. The action must be brought within 30 days after the date on which the child is born or the father is served with notice that he is or could be the child's father, whichever is later. Fam C §7631. The filing of this action suspends the adoption proceeding until a judgment in the action is final. Fam C §7631.

Procedures common to both actions. Either action may be filed before the child's birth. [Fam C §7633](#). Enforcement of the order or judgment will be stayed until the birth of the child. [Fam C §7633](#).

The Judicial Council has adopted a form of petition (see Judicial Council form FL-200) and response (see Judicial Council form FL-220) for use in a proceeding to establish a parental relationship under the [Uniform Parentage Act](#).

(3) [§130.22] Parties

The natural mother, each man presumed to be the father under [Fam C §7611](#) (see [§130.54](#)), and each man alleged to be the natural father may be made parties to the action, and must be given notice of the action under [Fam C §7666](#) and an opportunity to be heard. [Fam C §7635\(b\)](#). The court must join as parties any prospective adoptive parents who have physical custody of the child or licensed California adoption agency who has legal custody of the child. A joined party is not required to pay a fee in connection with this action. [Fam C §7630\(e\)\(1\)](#).

The child, if 12 years of age or older, must also be made a party to the action. [Fam C §7635\(a\)](#). If the child is a minor and a party to the action, the child must be represented by a guardian ad litem appointed by the court, and the guardian ad litem need not be represented by counsel if the guardian ad litem is a relative of the child. [Fam C §7635\(a\)](#). Appointment of a guardian ad litem is not required for a minor who is a parent of the child who is the subject of the petition to establish parental relationship, unless the minor parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case. [Fam C §7635\(b\)](#). If a child is under 12 years of age, the child *may* be made a party to the action. [Fam C §7635\(a\)](#). The judge may align the parties. [Fam C §7635\(c\)](#).

If a former husband is named on the birth certificate of a child born out of wedlock to his former wife, he may have presumed father status under the [Uniform Parentage Act \(UPA\)](#), has standing to bring a paternity petition, and is not required to establish presumed father status definitively if he brings the petition to establish that he is not the biological father of the child born to his former wife after the marriage was dissolved. *Said v Jegan* (2007) 146 CA4th 1375, 1382, 53 CR3d 661.

If a birth mother promptly asserts her legal maternity, a wife cannot be declared to be the natural or presumed mother of the child born as result of the husband's extramarital affair through a gender neutral application of the UPA, and the wife cannot be properly joined as a party to the parentage action for the child, despite the fact that the child may have been living with the husband and wife. *Amy G. v M.W.* (2006) 142 CA4th 1, 47 CR3d 297.

A biological mother of a child born out of wedlock has standing to assert presumed father status of a man who is not party to the action when the man was living with the mother when the child was born, and when he subsequently executed a voluntary declaration of paternity and married the mother, making him a necessary party to a paternity action initiated by a second man who believes himself to be the child's biological father. *Gabriel P. v Suedi D.* (2006) 141 CA4th 850, 863, 46 CR3d 437.

The hearing must be held in closed court, without the admittance of any persons other than those necessary to the action. Fam C §7643(a). All of the papers and records in the case are confidential, and they may only be inspected by parties to the action, their attorneys, and by agents acting pursuant to written authorization from the parties to the action or their attorneys. An attorney must obtain consent from the party that authorizes any agent to inspect the permanent record, and the attorney must state on the written authorization that he or she has obtained the consent of the party to authorize an agent to inspect the permanent record. Fam C §7643(b).

(4) Findings and Orders

(a) [§130.23] Findings

When an alleged natural father claims parental rights, the judge must first determine if the claimant is, in fact, the child's father. Fam C §7664(b). If the judge finds that the claimant is not the father, the judge must enter an order that this claimant's consent is not required for an adoption. Fam C §7664(b). If the judge finds that the claimant is the child's natural father, the judge must then determine:

- Whether the father is unfit as a parent if he has come forward promptly and demonstrated a full commitment to his parental responsibilities. See *Adoption of Kelsey S.* (1992) 1 C4th 816, 849, 4 CR2d 615; discussion in §130.20.
- In all other cases, whether it is in the child's best interest for the father to retain his parental rights or for the adoption to proceed. See §130.19.

In making this determination, the judge may consider all relevant evidence, including the father's efforts to obtain custody, the child's age and prior placement, and the effects on the child of a change in placement. Fam C §7664(b). If the judge finds it is in the child's best interest for the father to retain his parental rights, the judge must enter an order that the father's consent is necessary for any adoption. Fam C §7664(b). If the judge finds it is in the child's best interest for the adoption to proceed, the judge must enter an order that the father's consent is not required for an adoption. This finding terminates all the father's parental rights and

responsibilities with respect to the child. Fam C §7664(b). The parental preference afforded by Fam C §3041 in custody proceedings does not apply. Fam C §7664(b). Under Fam C §3041, a judge must find that granting custody to a parent would be detrimental to the child and that granting custody to a nonparent is in the child's best interest before the judge may award custody to a nonparent without the parents' consent. See *Adoption of Daniele G.* (2001) 87 CA4th 1392, 1401–1402, 1408, 105 CR2d 341 (guardianship should have been awarded to couple with whom child had resided since birth once judge found that removing child from their custody and giving custody to child's natural father would be "significantly detrimental" to her and that allowing her to remain in their custody would be in her best interest). Heightened evidentiary standards apply when the child is an Indian child. Fam C §3041(e); see §§130.105 et seq.

(b) [§130.24] Conclusiveness of Order

The judge's order determining the existence or nonexistence of the parent-child relationship is determinative for all purposes, except for actions for child neglect under Pen C §270. Fam C §7636. The existence of a valid parentage order bars the use of genetic test evidence in a subsequent proceeding to overturn the parentage determination. *In re Margarita D.* (1999) 72 CA4th 1288, 1296, 85 CR2d 713.

(c) [§130.25] Contents of Order

The order may contain provisions concerning the following (Fam C §7637):

- Support.
- Custody and guardianship of the child.
- Visitation with the child.
- Furnishing of a bond or other security for payment under the order.
- Any other matter in the child's best interest.
- The father's payment of the reasonable expenses of the mother's pregnancy and confinement.

The order may also provide that reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs, be paid by the parties as the judge determines. Fam C §7640. The fee provision encompasses all proceedings that occur in a case initiated through petition to establish parentage, including custody and support determinations or modification proceedings occurring after judgment. *Robert J. v Catherine D.* (2005) 134 CA4th 1392, 1398–1399, 37 CR3d 104.

(d) [§130.26] Appeal

An order requiring or dispensing with a father's consent may be appealed in the same manner as an order of the juvenile court declaring a child to be a ward of that court. [Fam C §7669\(a\)](#). Once an order is made, the court has no power to set aside, change, or modify the order. [Fam C §7669\(b\)](#). The order is conclusive and binding on the father. [Fam C §7669\(a\)](#).

(e) [§130.27] Inspection of Court File

All papers and records in the court's file for the action, other than the final order, are not subject to inspection by persons other than the parties and their attorneys. [Fam C §7643\(b\)](#). Only in exceptional cases, on a good-cause order, may other persons have access to these records. [Fam C §7643\(a\)](#).

b. Proceeding To Terminate Alleged Natural Father's Parental Rights**(1) [§130.28] Filing Petition and Its Effect**

A petition to terminate the parental rights of an alleged natural father must be filed before a judge may order the adoption of a child not having a presumed father, unless

- The alleged father has, in writing, denied paternity, waived his right to notice, or voluntarily relinquished the child for adoption or consented to the adoption ([Fam C §7662\(a\)](#));
- The father's relationship to the child has been terminated or determined by a court to be nonexistent ([Fam C §7662\(a\)\(1\)](#));
- The father has been served under [Fam C §7666](#) with a written notice alleging that he is or could be the child's natural father, and he fails to bring an action under [Fam C §7630\(c\)](#) to declare the existence of his parental relationship to the child within 30 days after service of the notice or the child's birth, whichever is later ([Fam C §7662\(a\)\(2\)](#)). See *Adoption of Aaron H.* (2000) 84 CA4th 786, 789–792, 101 CR2d 45 (judge properly denied father's motion to set aside order terminating his parental rights when father was aware he had to bring his action within 30 days from date he was served with notice the child was to be adopted, but failed to do so); or
- The alleged father has executed a written form developed by the department to waive notice, deny his paternity, relinquish the child for adoption, or consent to the adoption of the child. The form may

be executed before or after the birth of the child (Fam C §7662(a)(3), (b)).

- *Effect of filing petition:* All custody proceedings affecting the child and all proceedings under Fam C §§7500–7730 concerning the parent-child relationship are stayed pending final determination of the proceedings to terminate the father’s parental rights. Fam C §7662(c). A court may, however, issue an emergency protective order under Fam C §§6240–6274, or a domestic violence prevention order under Fam C §§6300–6389, if warranted, while the proceedings to terminate the father’s parental rights are pending. Fam C §7662(d).

(2) [§130.29] Who May File Petition

The petition may be filed by the agency, the mother or the person having physical or legal custody of the child, the person to whom the child has been or is to be relinquished, or the prospective adoptive parent. Fam C §7662(a).

(3) [§130.30] Hearing Date

The petition must either specify the date of the hearing or state that a hearing will be held on a date to be determined under Fam C §7667 and must be separately noticed. Fam C §7667(a).

The petition must be set for hearing within 45 days after it is filed and either service is completed or an order dispensing with notice of the proceeding is entered. Fam C §7667(a). The judge may continue the hearing date for up to 30 days, as necessary, to allow for the appointment of counsel and to enable counsel to prepare for the hearing, or for other good cause. Fam C §7668(a).

(4) [§130.31] Consolidation

If the father has filed an action under Fam C §7630(c) to establish his parental relationship to the child, the judge must consolidate this action with the petition to terminate the father’s parental rights. Fam C §7630(d). If the 7662 proceeding is filed in another court, transfer the action to that court unless the judge finds by clear and convincing evidence that a transfer poses a substantial hardship to the petitioner. Inconvenience to the petitioner alone is not enough to find substantial hardship. Fam C §7630(d)(3).

(5) [§130.32] Notice Requirements

The petitioner must give notice of the proceeding to each person identified as the natural father or possible natural father of the child in

accordance with the methods for service of process provided in the Code of Civil Procedure. Fam C §7666(a). Proof of service must be filed with the court before the hearing. Fam C §7666(a). A judge may issue an order dispensing with notice to a person who cannot be located. Fam C §7666(b); see *In re Emily R.* (2000) 80 CA4th 1344, 1352, 96 CR2d 285 (when address of alleged father in dependency proceeding is unknown and cannot be determined with due diligence, notice by publication is sufficient for due process). Before issuing such an order, the judge may conduct a hearing to determine the efforts made to locate the natural (or possible natural) father.

(6) [§130.33] Inquiry To Identify Father

In an effort to identify the natural father, the judge must cause inquiry to be made of the mother and any other appropriate person by the DSS or a licensed adoption agency, which is required to report its findings to the judge. Fam C §7663. If, after inquiry, the judge is unable to identify the natural father or any possible natural father, and no person has appeared in the proceeding claiming to be the natural father and claiming custodial rights, the judge must enter an order terminating the unknown natural father's parental rights with respect to the child. Fam C §7665. When the mother fraudulently fails to disclose the name of the natural father in an effort to prevent him from claiming parental rights, any subsequent adoption order may be set aside in an action brought by the father within three years after entry of the order. See Fam C §9102(b); §130.118.

(7) [§130.34] Judge's Determinations

If the father fails to appear at the hearing, or appears but does not claim parental rights, the judge must terminate his parental rights to the child. Fam C §7664(a). If the father claims parental rights, the judge must make the same “best-interest-of-the-child” determination as is required in the father's action to establish his parental rights. See Fam C §7664(b); discussion in §130.23. Family Code §3041, which prohibits an award of custody to a nonparent over a parent unless the judge finds that parental custody would be detrimental to the child, does not apply to a proceeding to terminate an alleged natural father's rights under the Uniform Parentage Act. Fam C §7664(b). However, a father who has promptly come forward and demonstrated a full commitment to his parental responsibilities may not have his parental rights terminated except on a showing by clear and convincing evidence that he is unfit to be a parent. See *Adoption of Kelsey S.* (1992) 1 C4th 816, 848–851, 4 CR2d 615; discussion in §130.20. See also *Adoption of Daniele G.* (2001) 87 CA4th 1392, 1401–1402, 1408, 105 CR2d 341 (once court found that granting custody to natural father

would be detrimental and that granting custody to couple with whom child had lived since birth would be in child's best interest, it should have granted couple's guardianship petition under [Fam C §3041](#); guardianship does not require termination of father's parental rights).

4. Proceeding To Declare Child Free From Parental Custody and Control

a. [§130.35] Applicability of Procedure

In general. Under [Fam C §§7800–7895](#), a proceeding may be brought to terminate the parental rights of the birth mother and/or presumed father (see [§130.14](#)) so that the child may be “freed” for adoption without the necessity of obtaining the parents' consent to the adoption. See [Fam C §§7802, 7820, 8606\(a\)](#). The parental rights of an alleged natural father may be terminated under the less stringent standards of the [Uniform Parentage Act](#) (UPA). See *Adoption of Michael D.* (1989) 209 CA3d 122, 129–132, 256 CR 884; discussion in [§130.34](#). A court cannot, however, terminate parental rights based only on stipulation of the parents to relinquish their parental rights. *Marriage of Jackson* (2006) 136 CA4th 980, 990, 39 CR3d 365 (court must make inquiry whether termination of parental rights is in children's best interests).

Juvenile court dependents. The procedure governed by [Fam C §§7800–7895](#) does not apply to a child who has been adjudged a dependent of the juvenile court under [Welf & I C §360\(c\)](#) on or after January 1, 1989, during the period the child is a dependent of the court. [Fam C §7808](#). This procedure may be applied, however, with respect to a child who has been adjudged a dependent of the juvenile court under [Welf & I C §300](#). See [Fam C §7823\(a\)\(2\)](#).

b. [§130.36] Purpose of Procedure

The purpose of this procedure is to serve the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life. [Fam C §7800](#). A declaration of freedom from parental custody and control terminates all parental rights and responsibilities with regard to the child. [Fam C §7803](#).

c. [§130.37] Grounds for Terminating Parental Rights

A judge may terminate a parent's rights only if the judge finds that one of the following grounds has been established by clear and convincing evidence ([Fam C §7821](#)):

- *Abandonment:*

- (1) The child has been left without provision for the child's identification by the parent or parents (Fam C §7822(a)(1));
- (2) The child has been left by both parents (or the sole parent) in the care and custody of another for six months without providing any support for or communicating with the child, with the intent to abandon the child (Fam C §7822(a)(2)); or
- (3) One parent has left the child in the care and custody of the other parent for at least one year without any provision for the child's support, or without communication from the parent and with the intent by the parent to abandon the child (Fam C §7822(a)(3)).

Abandonment is established only when there is a physical act—leaving the child for the prescribed period of time—combined with an intent to abandon, which may be presumed from a lack of communication or support. *In re Jacklyn F.* (2003) 114 CA4th 747, 754, 7 CR3d 768. Abandonment can be established by the voluntary act of domestic violence followed by incarceration and never seeking to care for the child. *Adoption of Allison C.* (2009) 164 CA4th 1004, 1011–1012, 79 CR3d 743. A judicial order taking custody of the child from a parent cannot support a finding of abandonment by that parent. 114 CA4th at 754–756. Nor can neglect of a child in one's own home be equated with or treated as leaving the child for purposes of Fam C §7822(a). *In re Justin G.* (1984) 151 CA3d 526, 530, 198 CR 717. Financial inability may excuse the failure to furnish any funds for the child's support, but the failure to communicate for the requisite statutory time period is an adequate basis for determining that the parent has abandoned the child. *Adoption of Oukes* (1971) 14 CA3d 459, 467, 92 CR 390. The failure to provide identification, to support, or to communicate is presumptive evidence of the intent to abandon. Fam C §7822(b). In determining intent to abandon, a judge may find abandonment if the parent has made only token efforts to support or communicate with the child. Fam C §7822(b). If a guardian has been appointed for the child, abandonment may still be established. Fam C §7822(b). The judge may consider not only the number and frequency of the parent's efforts to communicate with the child, but the genuineness of the efforts under all the circumstances, as well as the quality of the communication that occurred. *In re B.J.B.* (1986) 185 CA3d 1201, 1212, 230 CR 332. In determining whether an intent to abandon has been shown, the judge is not required to believe the parent's testimony or stated intent. *In re Brittany H.* (1988) 198 CA3d 533, 550, 243 CR 763 (finding may be based on parent's conduct). Family Code §7822 only requires a showing of an intent to abandon for the statutory period, not an intent to permanently abandon the child. *In re Daniel M.* (1993) 16 CA4th 878, 882–886, 20 CR2d 291. Failure to communicate for over three years while

incarcerated plus failure to support is sufficient to show intent to abandon. *Adoption of Allison C.* (2009) 164 CA4th 1004, 1013–1014, 79 CR3d 743. Even if the judge does not find an intent to abandon, the judge may determine that the parent’s consent to the adoption is not required under Fam C §8604(b) on finding that the parent “willfully” failed to support and communicate with the child for one year. See discussion in §§130.15–130.18.

The court is not precluded from finding intent to abandon even if a parent previously agreed to adoption, if the parent did not sign an adoption placement agreement, a consent to adoption, or a relinquishment. Fam C §7822(d). Nor is the court precluded from finding intent to abandon if the parent revokes a relinquishment or consent but then fails to take reasonable action to regain custody of the child. Fam C §7822(d).

If the child is an Indian child within the meaning of the Indian Child Welfare Act, however, evidence that the parent has transferred the child to an Indian custodian will not constitute abandonment unless the parent has failed to resume custody upon the request of the Indian custodian or has failed to substantially comply with any obligations assumed by the parent in an agreement with the Indian custodian over the objection of the Indian custodian. Fam C §7822(e); see discussion in §§130.105–130.112.

- *Neglect*: The child has been neglected or cruelly treated by either or both parents and has been a dependent of the juvenile court under Welf & I C §300 for one year. Fam C §7823(a).
- *Parent’s substance abuse*: The parent has a disability, resulting from alcohol or substance abuse (or is morally depraved), such that the parent is unable to care adequately for the child, and the child has been a dependent of the juvenile court continuously for one year immediately preceding the filing of the petition. Fam C §7824(a)–(b). For grounds based on one year as a juvenile court dependent under Fam C §§7823–7824, parental resumption of physical custody of the child for insubstantial periods of time does not interrupt the running of the one-year period. See Fam C §§7823(b) and 7824(c).
- *Child in out-of-home placement*: The child has been in an out-of-home placement under the supervision of the juvenile court, county welfare department, or other licensed child-placement agency for one year, and the judge finds that (1) returning the child to the parent would be detrimental to the child, and (2) the parent has failed during the one-year period and is likely to fail in the future to maintain an adequate parental relationship with the child (which includes providing both a home and care for the child). Fam C §7828(a). The “year” in question is not limited to the year

immediately preceding the filing of the petition; it may occur at any time before the petition is filed. *In re Connie M.* (1986) 176 CA3d 1225, 1235–1241, 222 CR 673. For grounds based on one year as a juvenile court dependent under Fam C §7828, the one-year period is determined under Fam C §7828(b)–(d). The judge must make a determination that reasonable services have been provided or offered to the parent, which were designed to aid the parent in overcoming the problems that led to the deprivation of custody, and that despite the availability of these services, returning the child to the parent would be detrimental to the child. Fam C §7828(e). If the child has been adjudged a dependent of the juvenile court, the judge must review and consider the contents of the juvenile court file in determining if the services offered were reasonable under the circumstances. Fam C §7828(e).

- *Parent convicted of felony:* If the parent has been convicted of a felony (see Fam C §7825), the facts of the crime must be of such a nature as to prove the parent's unfitness, and the court may consider a parent's criminal record prior to the felony conviction when the record demonstrates a pattern of behavior substantially related to the welfare of the child or ability to exercise control and custody of the child. Fam C §7825(a)(2). The focus in such cases is on the parent's unfitness to have the future custody and control of the child, as demonstrated by the facts underlying the felony conviction, unlike statutory provisions that govern dependency, custody, or guardianship proceedings wherein the welfare of the child is the sole determining factor in terminating parental rights. *In re Baby Girl M.* (2006) 135 CA4th 1528, 1539, 38 CR3d 484. The mother may file a petition against the father to terminate his parental rights when the child was conceived as a result of rape for which the father was convicted under Pen C §261. In such a case, there is a conclusive presumption that the father is unfit to have custody of the child. Fam C §7825(b).
- *Mentally ill or developmentally disabled parent:* The parent has been declared by a court to be developmentally disabled or mentally ill. Fam C §7826(a). The Director of Mental Health or Developmental Services must certify that the parent is incapable of caring for the child. Fam C §7826(b). Title II of the Americans With Disabilities Act (ADA) (42 USC §§12131 et seq) does not preclude a judge from terminating the parental rights of a gravely disabled person. *In re Anthony P.* (2000) 84 CA4th 1112, 1115–1117, 101 CR2d 423. A proceeding to terminate parental rights is

not a service, program, or activity within the meaning of Title II of the ADA and, therefore, is not preempted by it. 84 CA4th at 1116.

- *Mentally disabled parent:* The parent has a mental incapacity or disorder that renders the parent unable to care adequately for the child, and the parent is likely to remain mentally disabled for the foreseeable future. Fam C §7827(a)–(b). The evidence of two experts is required to support this finding. Fam C §7827(c)–(d). The judge must appoint an attorney to represent the parent if the parent does not have an attorney, whether or not the parent requests the appointment. Fam C §7827(e).

The provisions of Part 4, Freedom From Parental Custody and Control (Fam C §§7800–7895) do not apply to children who were adjudged dependent under Welf & I C §360(c) after January 1, 1989. For such children, parental rights may only be terminated under Welf & I C §366.26, Fam C §§8604–8606 and 8700, or Fam C §§7660–7670. Fam C §7808.

d. [§130.38] Filing and Service

Petition. The proceeding is initiated by filing a petition for an order or judgment declaring the child free from the custody and control of either or both parents. Fam C §7840(a). It may be filed by the Department of Social Services, a county welfare department, a licensed adoption agency, a county adoption department, a county probation department that is planning adoptive placement of the child with a licensed adoption agency, or any interested person (Fam C §§7840(a)(1), 7841), including the foster parents (see *In re Connie M.* (1986) 176 CA3d 1225, 1232–1233, 1240, 222 CR 673). Petitioners other than public agencies and nonprofit corporations may be liable for the costs of the investigation up to \$900. (Fam C § 7851.5)

The petition must be filed in the superior court for the county in which the child resides or in which the acts constituting the grounds for terminating the parent's rights occurred. Fam C §7845.

Citation. The petitioner must serve a citation on the person having custody of the child directing that person to appear at the hearing. Fam C §7880(a). The petitioner must also serve a citation on the child's father and mother if their residence is known, or on the grandparents and other adult relatives of the child if the father's or mother's residence is not known, advising them that they may appear at the hearing and that the petition has been filed for the purpose of freeing the child for adoptive placement. Fam C §7881(a)–(b).

Service must be made in the manner prescribed by law for service of a summons, at least ten days before the hearing. Fam C §§7880(c),

7881(c)–(d). If the father or mother cannot with reasonable diligence be served in this manner, the judge may order service by publication. See [Fam C §7882](#); *In re Emily R.* (2000) 80 CA4th 1344, 1352, 96 CR2d 285 (service by publication is sufficient for due process when alleged father’s address is unknown and cannot be determined with due diligence); *In re Matthew S.* (1988) 201 CA3d 315, 319, 247 CR 100 (service of mother by publication was appropriate when attempts were made to serve her at her last known address, inquiries were made through the Department of Motor Vehicles, and a search was made of the tax rolls, voter registration records, and telephone directories). A person having custody who fails to appear at the hearing after being personally served with a citation is in contempt of court unless he or she has reasonable cause for the failure to appear. [Fam C §7883](#).

Response. A responsive pleading is not required. *In re Angela R.* (1989) 212 CA3d 257, 273, 260 CR 612.

e. [§130.39] Investigation and Report

Requirements. The filing of the petition triggers an investigation of the matter by a juvenile probation officer, qualified court investigator, licensed clinical social worker, licensed marriage and family therapist, or county department designated to administer the county’s public social services program. See [Fam C §7850](#). The officer, investigator, social worker, therapist, or department must submit a written report of the investigation to the judge, with a recommendation about the proper disposition to be made in the proceeding in the child’s best interest. [Fam C §7851\(a\)](#). This report is mandatory. Failure to conduct the required investigation and issue the written report is a ground for vacating any order terminating parental rights. *In re Linda W.* (1989) 209 CA3d 222, 226–227, 257 CR 52. The judge must receive this report in evidence and consider its contents in rendering a judgment, although the judge is not bound to follow the recommendation set forth in the report. See [Fam C §7851\(d\)](#).

Copies. The child, the parents, the attorneys for the parties, court personnel, and any other person designated by the judge are entitled to inspect the report; otherwise, the report is confidential. See [Fam C §7805\(a\)](#). Due process requires that each party receive a copy of the report. *In re Linda W., supra*, 209 CA3d at 227.

Costs. The judge may defer, waive, or reduce the costs of the investigation and report if payment would cause an economic hardship that would be detrimental to the child’s welfare. [Fam C §7851.5](#). Otherwise, the petitioner (other than a public agency or nonprofit organization) is liable for all reasonable costs incurred in connection with

the proceeding, including the costs of the investigation up to \$900. [Fam C §7851.5](#).

f. [§130.40] Appointment of Counsel

Counsel for child. The judge must consider whether the child's interests require the appointment of counsel and, if so, must appoint counsel whether or not the child could otherwise afford it. [Fam C §7861](#). The judge must appoint counsel for the child if the judge finds the child has separate interests that are not protected in the contest between the petitioner and the parents. *In re Richard E.* (1978) 21 C3d 349, 354, 146 CR 604. See *In re Jenelle C.* (1987) 197 CA3d 813, 818–819, 241 CR 89 (judge need not appoint counsel for child whose interests are adequately protected by Department of Social Services). At the first hearing in the proceedings, the judge must consider whether counsel should be appointed. See *In re Brittany H.* (1988) 198 CA3d 533, 555, 243 CR 763 (appointment must be made at commencement of proceedings).

Counsel for parent. If a parent appears without counsel and is unable to afford counsel, the judge must appoint counsel for the parent, unless the parent knowingly and intelligently waives that right. [Fam C §7862](#). The judge may not appoint the same counsel to represent both the child and the parent. [Fam C §7860](#). A judge is not required to appoint counsel for an indigent parent who chooses to be absent from the proceedings and who has not communicated to the court his or her desire for representation. See *In re Ebony W.* (1996) 47 CA4th 1643, 1645, 1647–1648, 55 CR2d 337 (dependency proceeding under [Welf & I C §300](#)).

Who may be appointed and payment of compensation. The judge may either appoint the public defender or private counsel. [Fam C §7860](#). The judge may continue the proceeding for up to 30 days as necessary to appoint counsel and to enable counsel to become familiar with the case. [Fam C §7864](#). The judge determines the amount of compensation to be paid to private counsel. This compensation must be paid by the real parties in interest (other than the child) in proportions the judge considers just. [Fam C §7863](#). If the judge determines that any of the real parties in interest are unable to afford counsel, the compensation must be paid out of the general fund. [Fam C §7863](#).

Appeal. Ineffective assistance of counsel appointed to represent an indigent parent in a proceeding to terminate his or her parental rights is grounds for an appeal from any judgment terminating those rights. *Adoption of Michael D.* (1989) 209 CA3d 122, 135, 256 CR 884.

On appeal from a judgment terminating parental rights, the appellate court must appoint counsel for an indigent appellant. See [Fam C §7895](#). Appointment of counsel for an indigent respondent (*i.e.*, a parent whose

parental rights have *not* been terminated) is within the court’s discretion. *In re Bryce C.* (1995) 12 C4th 226, 231–235, 48 CR2d 120.

g. [§130.41] Hearing; Persons Who May Be Present

The petition must be set for hearing within 45 days after filing and service. See Fam C §7870(b). The judge may continue the hearing for up to 30 days to allow for the appointment of counsel (see Fam C §7864) or for other good cause (see Fam C §7871). Fam C §7870(c).

The child may not be present in court unless he or she so requests or a judge so orders. Fam C §7861. The appearance of a child younger than ten is required only if the judge so orders on a showing of necessity. Fam C §7880(b).

The judge must exclude the public from the hearing, unless the child or the parent (or guardian) requests a public hearing. Fam C §7884(a). However, the judge may admit any persons who have a direct and legitimate interest in the case or the work of the court. Fam C §7884(b).

h. [§130.42] Child’s Testimony

General considerations. The judge must consider the wishes of the child, keeping in mind the child’s age. Fam C §7890. If the child is ten years of age or older, he or she is entitled to be heard by the judge in chambers regarding his or her (1) feelings and thoughts about the proceeding, (2) parent or parents, and (3) preference as to custody. Fam C §7891(a). The child’s counsel may waive this in-chambers hearing. Fam C §7891(b). This evidence may not be presented through the hearsay testimony of another witness. *In re Nathaniel P.* (1989) 211 CA3d 660, 673–674, 259 CR 555 (testimony of child’s psychologist concerning statements child made to her).

Taking testimony outside parents’ presence. The judge may take the child’s testimony in chambers and outside the presence of the child’s parents if they are represented by counsel and the judge determines that (Fam C §7892(a))

- Testimony in chambers is necessary to ensure truthful testimony,
- The child is likely to be intimidated by a formal courtroom setting, or
- The child is afraid to testify in front of his or her parents.

This determination must be supported by clear and convincing evidence. Fam C §7892(c). If the child testifies in chambers, the parents or the child may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parents. Fam C §7892(d).

- ☛ JUDICIAL TIP: Many judges advise the parents of their right to have a read-back of the testimony when announcing the decision to take the child's testimony in chambers.

i. [§130.43] Consideration of Child's Best Interest

The judge must construe Fam C §§7800–7895 liberally to serve and protect the child's interests and welfare. Fam C §7801. In ruling on termination, the overriding consideration for the judge is the child's best interest. See Fam C §7890; *In re Michael G.* (1983) 147 CA3d 56, 61, 194 CR 745; *Marriage of Jackson* (2006) 136 CA4th 980, 994, 39 CR3d 365 (mother's voluntary relinquishment of her parental rights to two children was void on public policy grounds because no inquiry was made as to whether termination was in children's best interests). The welfare and best interest of a child is achieved by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life. Fam C §7800; *In re Ronell A.* (1996) 44 CA4th 1352, 1369, 52 CR2d 474.

If the judge determines that termination is in the child's best interests, the judge does not have discretion to refuse to grant the petition merely to give the parent a chance to reform. *In re Emily L.* (1989) 212 CA3d 734, 741, 260 CR 810. Shifting the focus from the child's welfare to the parent's rehabilitation ignores the law's overriding concern for the child's need for a permanent and secure home (see Fam C §7800). 212 CA3d at 743. See *In re Marilyn H.* (1993) 5 C4th 295, 307–310, 19 CR2d 544 (child's interest in permanency and stability takes priority after parent has been given a reasonable time to reform and has failed to do so).

Family Code provisions regarding parental preference in awarding custody of a child and requiring a finding that parental custody would be detrimental as a condition precedent to awarding custody to a nonparent (Fam C §§3020, 3022, 3040–3048, 3403) do not apply to a proceeding to free the child from parental control. Fam C §7807. Nevertheless, the judge must consider whether termination of parental rights is the least detrimental alternative available to protect the child's welfare; the least detrimental alternative must be viewed from the child's standpoint, not that of the parent. *In re Jasmon O.* (1994) 8 C4th 398, 426–427, 33 CR2d 85.

In order to terminate parental rights, it is not necessary that the child already be in a potential adoptive home or that a prospective adoptive parent must be identified. *In re David H.* (1995) 33 CA4th 368, 378, 39 CR2d 313.

j. [§130.44] Judgment Terminating Parental Rights

A judgment declaring a child free from the custody and control of a parent is conclusive and binding on the child, the parent, and all other persons who have been served with citations. [Fam C §7894\(a\)](#). The judge has no power to set aside, change, or modify the judgment. [Fam C §7894\(b\)](#). A statement of decision is not required unless requested by a party. *In re Marcel N.* (1991) 235 CA3d 1007, 1013, 1 CR2d 240.

If the judgment terminates the rights of both parents or leaves no parent with custody, the judge must appoint a guardian or refer the child to a licensed adoption agency for placement. See [Fam C §7893](#).

An adoption order is void if entered before the judgment terminating parental rights is final. *In re Brittany H.* (1988) 198 CA3d 533, 552–553, 243 CR 763.

A termination of parental rights terminates the parent’s support obligation. *Marriage of Dunmore* (2000) 83 CA4th 1, 5, 98 CR2d 885; see *County of Ventura v Gonzales* (2001) 88 CA4th 1120, 1122–1125, 106 CR2d 461 (order terminating parental rights severs parent-child relationship and deprives court of authority to order parent to pay child support).

5. Proceeding in Guardianship Proceeding to Declare Child Free From Parental Custody and Control

a. [§130.45] Requirements

A proceeding to have a child declared free from the custody and control of one or both parents may be brought in a guardianship proceeding under [Fam C §§7800–7895](#), if all of the following requirements are satisfied ([Prob C §1516.5\(a\)](#)):

- One or both parents do not have the legal custody of the child.
- The child has been in the physical custody of the guardian for a period of not less than two years.
- The court finds that the child would benefit from being adopted by his or her guardian. In making this determination, the court shall consider all factors relating to the best interest of the child, including, but not limited to, the nature and extent of the relationship between all of the following:
 - The child and the birth parent.
 - The child and the guardian, including family members of the guardian.
 - The child and any siblings or half-siblings.

The findings must be supported by clear and convincing evidence. Fam C §7821; *In re Guardianship of Ann S.* (2009) 45 C4th 1110, 90 CR3d 701.

The court must appoint a court investigator or other qualified professional to investigate all factors enumerated above. The findings of the investigator or professional regarding those issues shall be included in the written report required by Fam C §7851. Prob C §1516.5(b).

The rights of the parent, including the rights to notice and counsel provided in Fam C §§7800–7895, apply to such actions. Prob C §1516.5(c); see §130.55.

This provision does not apply to any child who is a dependent of the juvenile court or to any Indian child. Prob C §1516.5(d).

b. [§130.46] Constitutionality

Although Prob C §1516.5 allows termination of parental rights based on the best interests of the child without a finding of parental unfitness, it is not unconstitutional. The constitutional due process right to a finding of unfitness only applies to custodial parents facing a termination of their rights. It is not applicable to Prob C §1516.5, where the parent has been deprived of custodial rights by the guardianship for at least two years. After years of guardianship, the child has a fully developed interest in a stable, continuing, and permanent placement with a fully committed caregiver. The guardian, after fulfilling a parental role for an extended period, has also developed substantial interests that the law recognizes. The parental unfitness criterion fails to account for these competing interests, whereas the best interest of the child standard allows the court to appropriately balance all the relevant factors arising from the child's family relationships. *In re Guardianship of Ann S.* (2009) 45 C4th 1110, 1118, 90 CR3d 701; *In re Charlotte D.* (2009) 45 C4th 1140, 1142–1143, 90 CR3d 724 (not unconstitutional as to father who had not been deprived of right to access to child).

However, a parent faced with the termination of his or her rights under Prob C §1516.5 might be in a position to assert a due process claim that a showing of unfitness was required. Such a claim would have to be based on a showing by a mother or natural father that they lack custody but promptly came forward and demonstrated a full commitment to parental responsibilities—emotional, financial, and otherwise, including dem-

onstrating a willingness to assume full custody of the child—not merely to block adoption by others. *In re Charlotte D.*, *supra*, 45 C4th at 1143; see *In re Guardianship of Ann S.*, *supra*, 45 C4th at 1118; *Adoption of Kelsey S.* (1992) 1 C4th 816, 849, 4 CR3d 615.

C. General Provisions Applicable to Adoptions of Unmarried Minors

1. [§130.47] Eligibility To Adopt

An unmarried minor may be adopted by any adult. [Fam C §8600](#). The adopting parent must be at least ten years older than the child, unless the adopting parent is a stepparent or married relative of the child (*i.e.*, a sister, brother, aunt, uncle, or first cousin). [Fam C §8601](#).

The court may not deny an adoption petition solely because the prospective adoptive parents are too old; it must evaluate their ages in relation to other factors in assessing whether the adoption is in the child's best interest. See *In re T.S.* (2003) 113 CA4th 1323, 1328, 7 CR3d 173 (older age of prospective adoptive parent is not legal impediment to adoption of child); *Cain v Adoption Agency* (1976) 54 CA3d 1127, 1131–1134, 126 CR 836 (petition for agency adoption of 5-year-old filed by 66-year-old father and 48-year-old mother); *Adoption of Michelle T.* (1975) 44 CA3d 699, 703–708, 117 CR 856 (petition for independent adoption of 2-year-old filed by 70-year-old father and 54-year-old mother).

An unmarried adult is eligible to adopt a child. See *Department of Social Welfare v Superior Court* (1969) 1 C3d 1, 5, 81 CR 345. Adoption agencies must inform unmarried applicants that their ability to adopt is not limited by their marital status. See [22 Cal Code Regs §35011\(a\)\(2\)](#).

2. [§130.48] Consent Requirements

If a child has a presumed father, a judge may grant an adoption petition only if the birth parents have consented to the adoption unless there is a statutory ground for dispensing with their consent. See [Fam C §§8604\(a\), 8605](#); see discussion regarding presumed father status in [§130.52](#). The presumed father's consent is not required unless the presumed father status results from meeting statutory criteria in [Fam C §7540, §7570 or §7611\(c\)](#) prior to the mother's irrevocable relinquishment or consent. [Fam C §8604\(a\)](#). A "birth parent" is a child's biological parent, or the adoptive parent of a child who has been adopted previously. [Fam C §8512](#).

The parent-child relationship between a child and the natural mother may be established by proof that she gave birth to the child. [Fam C §7610\(a\)](#). The relationship may also be established for a lesbian partner who donates her eggs to the birth mother. *K.M. v E.G.* (2005) 37 C4th 130, 138, 33 CR3d 61 (both the woman who donated her eggs to her former lesbian partner, with whom she was registered in domestic partnership, and her former partner were parents of children born, despite the woman's execution of written waiver of right to resulting children at time of donation; the woman's genetic relationship to children constituted

evidence of mother-child relationship, and she did not intend simply to donate her eggs, but rather intended her partner to give birth to a child that would be raised in their joint home). In addition, any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. In making this determination, the provisions of the [Uniform Parentage Act \(UPA\)](#) ([Fam C §§7600–7730](#)) applicable to the father and child relationship apply insofar as practicable. [Fam C §7650\(a\)](#). Thus, for example, a woman who is not the child's biological mother, nevertheless, may be determined to be the child's "presumed mother" under [Fam C §7611](#), e.g., by receiving the child into her home and holding out the child as her natural child. *Elisa B. v Superior Court* (2005) 37 C4th 108, 119, 33 CR3d 46 (former lesbian partner of mother of children was presumed parent under [Uniform Parentage Act \(UPA\)](#), and former partner's lack of genetic connection to children was insufficient to rebut presumption when former partner had agreed to raise children, supported mother's artificial insemination using an anonymous donor, and received resulting twin children into her home and held them out as her own; *In re Karen C.* (2002) 101 CA4th 932, 937–940, 124 CR2d 677 (birth mother gave child to friend who raised child as her own). See *In re Salvador M.* (2003) 111 CA4th 1353, 1358–1359, 4 CR3d 705 (adult sister of child claimed "presumed mother" status under [Fam C §7611\(d\)](#) because she had raised child as her own since their mother's death; this was not appropriate case to find that presumption was rebutted under [Fam C §7612](#) as there was no competing maternal interest). However, denial of presumed mother status to the wife of a father as to the father's child born as result of father's extramarital affair with the mother, even when the child lives with the father and his wife since one month of age, has been held to not violate due process. *Amy G. v M.W.* (2006) 142 CA4th 1, 15, 47 CR3d 297.

The parent-child relationship between a child and the natural father may be established under the provisions of the UPA, including the presumptions of paternity afforded by the Act. See [Fam C §7610\(b\)](#); discussion in [§§130.51–130.54](#).

The parent-child relationship between a child and an adoptive parent may be established by proof of adoption. [Fam C §7610\(c\)](#).

If a parent's consent is required but not given, a judge does not have jurisdiction to grant the adoption and any adoption decree that is entered is void. *In re Brittany H.* (1988) 198 CA3d 533, 553, 243 CR 763.

Consent must also be obtained from the spouse of a married adoptive parent (see [Fam C §8603](#)), the child if over 12 years of age ([Fam C §8602](#)), and others, depending on the type of adoption. See [§§130.66–130.67](#) (independent adoptions), [130.78](#) (stepparent adoptions). See also mandatory Judicial Council form ADOPT-210, Adoption Agreement.

a. [§130.49] When Consent Is Not Required

A birth parent's consent is not required when the birth parent has (Fam C §8606):

- Been judicially deprived of custody and control of the child by a court order under Fam C §§7800–7895 (see §§130.35–130.44) or Welf & I C §366.26 (see *In re David H.* (1995) 33 CA4th 368, 380, 39 CR2d 313), or by a similar court order of another jurisdiction;
- Voluntarily surrendered the right to custody in a judicial proceeding;
- Deserted the child without providing for identification of the child; or
- Relinquished the child for adoption to the DSS or a licensed adoption agency, or to a licensed or authorized child-placement agency in another jurisdiction. Fam C §8606.

A noncustodial parent's consent is not required if he or she has willfully failed to communicate with and support the child for a period of one year. See Fam C §8604(b)–(c); discussion in §§130.15–130.18.

b. [§130.50] Consent of Presumed or Biological Father

Presumed father. The statutory right of a father to block an adoption by withholding his consent is equal to the mother's right only if he is a "presumed father" under Fam C §7540 (conclusively presumed father), Fam C §7570 (conclusively presumed father), or Fam C §7611 (rebuttably presumed father). Fam C §8604(a); *Adoption of Michael H.* (1995) 10 C4th 1043, 1051, 43 CR2d 445. A presumed father's consent is required, unless his relationship to the child has been terminated previously or determined by a court not to exist, or he has voluntarily relinquished the child for adoption or consented to the adoption. Fam C §7660. A presumed father's consent is not required unless he becomes a presumed father before the mother's relinquishment or consent becomes irrevocable, or the mother's parental rights are terminated. Fam C §8604(a). If the presumed father waives notice in a signed, notarized form signed before a notary or authorized representative, then no consent to adoption is required. The consent may be signed before or after the birth. Note that special procedures and notices under ICWA must be met if the child is an Indian child. Fam C §7660.5; see discussion in §130.106.

Biological father. A biological father of the child who does not meet any of the statutory presumptions of paternity, and who wishes to obtain the right to block the adoption by refusing to give his consent, must file an action under Fam C §7630(c) or §7631 to obtain a judicial declaration of

his paternity and a judicial determination that it is in “the child’s best interest” that he retain his parental rights and that his consent is necessary for any adoption. See [Fam C §7664\(b\)](#); *Adoption of Michael H.*, *supra*, 10 C4th at 1051–1052; discussion in §§130.23–130.27. A different standard applies when the father has come forward promptly and demonstrated a full commitment to his parental responsibilities. Such a father has constitutionally protected parental rights that may be terminated only on “a showing of his unfitness as a parent.” See *Adoption of Kelsey S.* (1992) 1 C4th 816, 849, 4 CR2d 615; discussion in §130.20.

The court in *In re Ninfa S.* (1998) 62 CA4th 808, 811, 73 CR2d 209, stated that “a biological father’s rights are limited to establishing his right to ‘presumed’ father status, and the court does not err by terminating a biological father’s parental rights when he has had the opportunity to show presumed father status and has not done so.”

(1) [§130.51] Conclusive Presumption of Paternity

Proof that may rebut presumption. A man is conclusively presumed to be the natural father of the child of his cohabiting wife, as long as he is not impotent or sterile. [Fam C §7540](#). This conclusive presumption is a social policy statement made by the Legislature to protect the integrity of the family unit. Due process challenges to the conclusive presumption that the husband is the father of a child conceived during the marriage have been rejected by both the California and United States Supreme Courts. See *Michael H. v Gerald D.* (1989) 491 US 110, 109 S Ct 2333, 105 L Ed 2d 91; *Dawn D. v Superior Court* (Jerry K.) (1998) 17 C4th 932, 935, 72 CR2d 871. The due process clause does not apply to a biological father’s desire to establish a personal relationship with the child, which is not a fundamental liberty interest. 17 C4th at 942; *In re Kiana A.* (2001) 93 CA4th 1109, 1114, 113 CR2d 669.

This “conclusive” presumption may be challenged, however, at any time by proof that the husband and wife were not cohabiting, *i.e.*, living together on a day-to-day basis, at the time of conception. See *Brian C. v Ginger K.* (2000) 77 CA4th 1198, 1204–1206, 1217–1219, 92 CR2d 294 (conclusive presumption does not apply if there is no valid marriage, no substantive cohabitation, or if there are more than nine months between time husband and wife might have cohabited to child’s birth); *Steven W. v Matthew S.* (1995) 33 CA4th 1108, 1114–1115, 39 CR2d 535; *Fuss v Superior Court* (1991) 228 CA3d 556, 561 n3, 279 CR 46. The presumption may also be challenged by proof of the husband’s impotence or sterility. See *Marriage of Freeman* (1996) 45 CA4th 1437, 1444, 1448–1449, 53 CR2d 439 (sterility is defined in the strictest sense; it is limited to cases in which, by a preponderance of the evidence, a party can show

that the presumed father could not produce a live sperm count at the time of conception).

Motion for genetic tests. The presumption may also be challenged by filing a motion for genetic tests within two years of the child’s birth. [Fam C §§7540, 7541](#). In such an event, the judge must determine paternity in accordance with the conclusions of all the experts as disclosed by the evidence based on genetic tests performed in accordance with the requirements of [Fam C §§7550–7558](#). [Fam C §7541\(a\)](#). The motion for genetic tests may be filed by the mother, the child through a guardian ad litem, the husband, or a presumed father under [Fam C §§7611–7612](#) (see [§130.54](#)). [Fam C §7541\(b\)–\(c\)](#). It may not be filed by a man who claims to be the child’s biological father, but who does not meet the definition of a “presumed father.” *Rodney F. v Karen M.* (1998) 61 CA4th 233, 238–239, 71 CR2d 399. A court may also order genetic testing in a “proceeding in which paternity is a relevant fact.” [Fam C §7551](#).

When the conclusive presumption of paternity applies because the mother of the child is married, it is irrelevant that the biological father can prove his paternity or even that all parties concede that he is the biological father. *Rodney F. v Karen M.*, *supra*, 61 CA4th at 240. See *Miller v Miller* (1998) 64 CA4th 111, 119, 74 CR2d 797.

Genetic tests may not be used to challenge paternity and the “conclusive” presumption may not be disputed in a case in which a final judgment of paternity was entered before October 1, 1980, a case under [Fam C §7613](#) in which the wife with the husband’s consent conceived the child as a result of artificial insemination, or a case in which the wife with the husband’s consent conceived the child by means of a surgical procedure. [Fam C §7541\(e\)](#). A judicial finding of paternity must be given conclusive effect; the parties are barred from using genetic test evidence in a subsequent proceeding to overturn the paternity determination. *City & County of San Francisco v Cartagena* (1995) 35 CA4th 1061, 1065, 41 CR2d 797.

The court should use mandatory Judicial Council form FL-627, Order for Genetic (Parentage) Testing.

(a) [§130.52] Declaration of Paternity

Effect of declaration. A father who is not married to the child’s birth mother may establish his paternity by completing a paternity declaration at the time of the child’s birth. [Fam C §§7571, 7573–7574](#). Once signed and filed with Child Support Services, the declaration has the effect of a judgment and is a conclusive presumption of paternity. *In re William K.* (2008) 161 CA4th 1, 8, 73 CR3d 737. Such a declaration filed with the Department of Child Support Services has the same force and effect as a paternity judgment issued by a court of competent jurisdiction. [Fam C](#)

§7573; *In re Raphael P.* (2002) 97 CA4th 716, 722–723, 738, 118 CR2d 610 (under Evid C §664, it is presumed that voluntary declaration, once signed, has been filed); *In re Liam L.* (2000) 84 CA4th 739, 745, 101 CR2d 13. It confers on the declarant presumed father status. Fam C §7611; 84 CA4th at 743–746; see §130.19. A paternity declaration signed by the father in another state is entitled to full faith and credit in California and qualifies him for presumed father status. *In re Mary G.* (2007) 151 CA4th 184, 198, 59 CR3d 703.

A judgment of paternity based upon a voluntary declaration of paternity may be set aside on a motion by the mother, the previously established father, or the child “if genetic testing indicates the previously established father is not the biological father of the child.” Fam C §7646(a). But even if genetic testing demonstrates that the previously established father is not the biological father, the court may deny a motion to vacate the judgment if doing so is in the best interest of the child. Fam C §7648; *In re William K.*, *supra*, 161 CA4th at 8. Use mandatory Judicial Council form FL-272, Notice of Motion to Set Aside Judgment of Paternity.

Rescission of declaration. Either parent may rescind the declaration by filing a rescission form with the Department within 60 days of the date on which the declaration was executed, unless a court order for custody, visitation, or child support has been entered in an action in which the parent seeking to rescind was a party. Fam C §7575(a). On written request, the Department must provide a judge or commissioner with a copy of any rescission form filed with the Department that is relevant to proceedings before the judge or commissioner. Fam C §7575(a).

Challenge to paternity. The father’s paternity may be challenged by filing a notice of motion for genetic tests within two years of the child’s birth (Fam C §7575(b)(3)), or by filing a motion for relief under CCP §473 within the time limits specified in that section (Fam C §7575(c)). This notice must be supported by a declaration under oath submitted by the moving party (local child support agency, mother, or man who signed the voluntary declaration) stating the factual basis for putting the issue of paternity before the court. Fam C §7575(b)(4). A motion for genetic testing may be brought only by the mother, the declarant father, or the local child support agency in any action that determines custody of the minor. Fam C §7575(b)(3)(A); *In re William K.*, *supra*, 161 CA4th at 8. The trial court is also authorized, on its own motion, to order genetic testing as relevant to resolve issues raised by voluntary declaration of paternity executed by cohabitant of biological mother, when the mother’s conduct precluded the man who initiated paternity action from attaining presumed father status. *Gabriel P. v Suedi D.* (2006) 141 CA4th 850, 860, 46 CR3d 437.

If the test results show that the man who signed the voluntary declaration is not the father of the child, the court may set aside the declaration unless the court determines that *not* setting aside the declaration would be in the best interest of the child considering (Fam C §7575(b)(1)):

- Age of the child;
- Length of time since declaration signed;
- Nature, duration, and quality of relationship between declarant and child including time during which they lived together or enjoyed a parent-child relationship;
- Request of declarant that the relationship continue;
- Whether biological father submitted notice of no objection to the relationship;
- Benefit or detriment to the child in establishing biological parentage;
- Whether declarant's conduct impaired ability to ascertain identity of or get support from biological father; and
- Additional relevant factors.

If the court does not set aside the declaration, it must state the basis for the denial and supporting facts on the record. Fam C §7575(b)(2).

Statutory presumption. A man who executed a declaration of paternity on or before December 31, 1996, is conclusively presumed to be the child's father. Fam C §7576(a). This presumption has the same force and effect as the conclusive presumption of Fam C §7540. Fam C §7576(a). The presumption may, however, be challenged by a notice of motion for genetic tests filed within three years of the date on which the declaration of paternity was signed. Fam C §7576(d). This presumption overrides all statutory presumptions of paternity except a presumption arising under Fam C §7540 or §7555. Fam C §7576(e).

(b) [§130.53] Child Conceived by Artificial Insemination

If, under the supervision of a licensed physician and surgeon and with the husband's consent, a wife is inseminated artificially with semen donated by another man, the husband is deemed to be the natural father of the child conceived by this procedure. Fam C §7613(a). The husband's consent must be in writing, and signed by the husband and the wife. Fam C §7613(a). The physician and surgeon must certify their signatures and the date of insemination, and must retain the husband's consent as part of the medical record; a failure to do so does not, however, affect the father-

child relationship. [Fam C §7613\(a\)](#). See *Shin v Kong* (2000) 80 CA4th 498, 504–509, 95 CR2d 304 (husband has no cause of action in tort against physician for failure to comply with these requirements); *Alexandria S. v Pacific Fertility Med. Ctr., Inc.* (1997) 55 CA4th 110, 123–126, 64 CR2d 23 (child has no cause of action for malpractice against physician and surgeon for failure to comply with these requirements). The semen donor provided to a licensed physician and surgeon or to a licensed sperm bank is not deemed to be the natural father of the child conceived by artificial insemination or in vitro fertilization. [Fam C §7613\(b\)](#); *Steven S. v Deborah D.* (2005) 127 CA4th 319, 326–327, 25 CR3d 482 (a woman obtains statutory protection from a donor’s paternity claim by obtaining the semen from a chosen donor through a licensed physician, notwithstanding an intimate relationship between the sperm donor and the woman). By statute, a person who has sexual intercourse or causes conception with the intent to become a legal parent by assisted reproduction in this state thereby submits to the jurisdiction of the courts of this state as to an action brought with respect to a child who may have been conceived by that act of intercourse or assisted reproduction. [Fam C §7620](#).

(2) [§130.54] Rebuttable Presumption of Paternity

Presumptions. A man is rebuttably presumed to be the natural father of the child if he meets any of the following conditions ([Fam C §7612\(a\)](#)):

- *Marriage:* He and the child’s mother are (or have been) married and the child is born during the marriage or within 300 days after termination of the marriage or the entry of a decree of separation. [Fam C §7611\(a\)](#). Unlike the “conclusive” presumption of [Fam C §7540](#) (see [§130.51](#)), there is no requirement of cohabitation.
- *Attempted marriage before birth:* Before the child’s birth, he and the child’s mother attempted to marry but the marriage is (or could be declared) invalid, and the child is born during the attempted marriage or within 300 days after its termination if the marriage could be declared invalid only by a court or the child is born within 300 days after termination of cohabitation if the marriage is invalid without a court order. [Fam C §7611\(b\)](#).
- *Attempted marriage after birth:* After the child’s birth, he and the child’s mother have married (or attempted to marry) but the attempted marriage is invalid, and he is named as the child’s father on the child’s birth certificate with his consent or is obligated to support the child under a written promise or by court order. [Fam C §7611\(c\)](#).

- *Receipt of child into home*: He receives the child into his home and openly holds out the child as his natural child. Fam C §7611(d). Both of these elements must be established by a preponderance of the evidence. *Miller v Miller* (1998) 64 CA4th 111, 117, 74 CR2d 797.

☛ JUDICIAL TIP: To be a presumed father under the last condition listed above, a man must *physically* bring the child into his home.

In limited circumstances, the presumptions of paternity listed in Fam C §7611 have been applied to women. *Amy G. v M.W.* (2006) 142 CA4th 1, 12, 47 CR3d 297 (citing *In re Karen C.* (2002) 101 CA4th 932, 937–938, 124 CR3d 677; *In re Salvador M.* (2003) 111 CA4th 1353, 1357–1358, 4 CR3d 705; *Elisa B. v Superior Court* (2005) 37 C4th 108, 119–120, 33 CR3d 46).

A man cannot *constructively* receive a child into his home within the meaning of the statute. *Adoption of Michael H.* (1995) 10 C4th 1043, 1051, 43 CR2d 445; *In re Kyle F.* (2003) 112 CA4th 538, 542, 5 CR3d 190; *Glen C. v Superior Court* (2000) 78 CA4th 570, 585, 93 CR2d 103. See *Adoption of Kelsey S.* (1992) 1 C4th 816, 825–830, 4 CR2d 615 (rejecting father’s contention that he should be deemed a presumed father because he did all he could do under the circumstances to receive the child into his home after he was prevented by the mother, a court order, and actions taken by the prospective adoptive parents from physically receiving the child into his home); *In re Spencer W.* (1996) 48 CA4th 1647, 1652–1655, 56 CR2d 524 (no “presumed father” status when mother permitted alleged father to reside in her home). Living with the mother while she was pregnant does not constitute receiving the child into the home. *In re Tanis H.* (1997) 59 CA4th 1218, 1229–1231, 69 CR2d 380. A father *does* meet the elements of the statutory presumption, however, when the child lives part time with the father and part time with the mother, the father has been involved with the child since birth and has bonded with the child, and the father has provided financially for the child’s needs and has held himself out as the child’s father. *In re A.A.* (2003) 114 CA4th 771, 784, 7 CR3d 755.

Rebutting presumptions. Although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity under Fam C §7611, there can be only one presumed father. *In re Jesusa V.* (2004) 32 C4th 588, 603, 10 CR3d 205. These competing presumptions may be reconciled under Fam C §7612.

A man’s presumed father status under Fam C §7611 may be rebutted in an appropriate action by clear and convincing evidence. Fam C §7612(a). However, an alleged biological father of a child born to a married woman does not have a constitutional right to challenge presumed

father status of the woman's husband. *Dawn D. v Superior Court* (Jerry K.) (1998) 17 C4th 932, 952, 72 CR2d 871. Only the following persons have standing, however, to challenge a husband's paternity to a child (Fam C §7630(a)):

- The child;
- The child's natural mother; or
- The child's presumed father.

On the other hand, a wife cannot be declared a natural or presumed mother through gender neutral interpretation of the UPA for a child born to another woman as a result of the husband's extramarital affair when the birth mother promptly asserts her legal maternity, despite the fact that the child may have been living with the husband and wife. *Amy G. v M.W.*, *supra*, 142 CA4th at 17–18.

A man's presumed father status under Fam C §7611(d) is not necessarily rebutted under Fam C §7612(a) by his admission that he is not the child's biological father. *In re Nicholas H.* (2002) 28 C4th 56, 58–59, 63–64, 70, 120 CR2d 146. Likewise, a nonbiological father's presumption of paternity under Fam C §7611(d) is not necessarily defeated by the biological father's competing claim to be the child's presumed father. *In re Jesusa V.*, *supra*, 32 C4th at 604–606 (there is no automatic preference for biological fathers, even biological father who has come forward to assert his rights). See *Adoption of Kelsey S.* (1992) 1 C4th 816, 823 n3, 4 CR2d 615 (even if paternity is denied and legally disproved, man may be deemed, under some circumstances, to be presumed father). California recognizes that developed parent-child relationships that afford children social and emotional strength and stability can substitute for biological ties. *In re A.A.*, *supra*, 114 CA4th at 780–781; *Elisa B. v Superior Court* (2005) 37 C4th 108, 119, 33 CR3d 46 (lesbian partner was presumed mother, despite lack of genetic ties to twins, because she had actively participated in causing the children to be conceived with the understanding that she would raise the children as her own, together with the birth mother, and because she had received them into her home and openly held them out as her own); *In re Salvador M.* (2003) 111 CA4th 1353, 1357–1358, 4 CR2d 705 (paternity presumptions are driven, not by biological paternity, but by state's interest in child's welfare and integrity of family). Genetic proof that a man is not the child's biological father does not preclude the man from qualifying as the child's presumed father under Fam C §7611. *In re Raphael P.* (2002) 97 CA4th 716, 724–725, 118 CR2d 610. Many cases generally reflect a determination that biology is not necessarily determinative of legal paternity, and specifically that social relationships may “trump” genetics in an appropriate case. 97 CA4th at 730, 733–734. When a man's presumed father status is challenged under

Fam C §7612(a), the court must consider whether rebuttal of the presumption is appropriate given the circumstances of the case. *In re Jesusa V.*, *supra*, 32 C4th at 606. It should be noted that the marital presumption of Fam C §7540 (see §130.51) and the voluntary declaration of paternity presumption of Fam C §§7570 *et seq* (see §130.52) are expressly excepted from the operation of Fam C §7612(a).

A man's presumed father status *is* rebutted by a judgment establishing the paternity of another man. Fam C §7612(c); *In re Nicholas H.*, *supra*, 28 C4th at 63; *Barkaloff v Woodward* (1996) 47 CA4th 393, 399, 55 CR2d 167 (presumption was conclusively rebutted under Fam C §7612 by stipulated judgment of child's paternity by another man). But see *In re A.A.*, *supra*, 114 CA4th at 788–789 (determination in dependency case that one man is child's biological father does not necessarily defeat another man's presumed father status under Fam C §7611).

If two or more presumptions arise under Fam C §7610 or §7611 that conflict with each other, or if a presumption under Fam C §7611 conflicts with a claim pursuant to Fam C §7610, whichever presumption is based on the weightier considerations of policy and logic controls. Fam C §7612(b). Courts are not bound to accord determinative weight to biology, but must weigh all relevant factors. *In re Jesusa V.*, *supra*, 32 C4th at 607–608, 612. See *Steven W. v Matthew S.* (1995) 33 CA4th 1108, 1116–1117, 39 CR2d 535 (in applying paternity presumptions, courts generally favor father who has raised and cared for child over biological father who has not established relationship with child). For example, in *Steven W.*, two men had presumed father status of the child. Although blood tests established that one of the men was the child's biological father, the court determined that the other man's presumption of paternity should prevail because he had developed an “enduring father-child relationship” with the child, and therefore, the conflict between the presumptions weighed in his favor. 33 CA4th at 1117. See *In re Kiana A.* (2001) 93 CA4th 1109, 1118–1119, 113 CR2d 669 (if genetic testing had been performed and had shown that one of two presumed fathers was child's biological father and other was not, this other father would not necessarily lose his presumed father status). *Child conceived by criminal act.* A man may not be a presumed father if the child was conceived as the result of an act in violation of Pen C §261 and the father was convicted of that violation; or the child was conceived as a result of an act in violation of Pen C §261.5, the father was convicted of that violation, and the mother was under 15 years of age and the father was 21 years of age or older at the time of conception. Fam C §7611.5. See *In re Kyle F.* (2003) 112 CA4th 538, 544–545, 5 CR3d 190 (statute does not preclude 18-year-old unwed father from attempting to demonstrate full commitment to assume his parental

responsibilities toward child born to mother who was 16 at time of conception). The child, the birth mother, the adoption agency, or the prospective adoptive parent of the child may bring an action to declare that a man is not the child's presumed father under [Fam C §7611](#) within a reasonable time after obtaining knowledge of the facts. [Fam C §7630](#).

3. [§130.55] Notice Requirements

Notice to father. When a mother relinquishes a child for adoption or consents to the child's adoption, notice of the adoption proceeding must be given to the child's father if he is a "presumed father" (see §§130.50–130.54), unless his relationship to the child has been terminated previously or determined by a court not to exist, or he has voluntarily relinquished the child for adoption or consented to the adoption. [Fam C §7660](#). A presumed father may waive notice under [Fam C §7660](#) before or after the birth and if done on a form signed before a notary or authorized representative, no consent is needed for adoption to proceed. [Fam C §7660.5](#).

A biological father who is not a presumed father must be given notice of the adoption proceeding under [Fam C §§7664\(a\) and 7666](#).

If a man brings an action to determine paternity of a child in the physical custody of a prospective adoptive parent or an adoption agency, the man is required to serve the entire pleading and notice on the adoption agency and/or the prospective adoptive parent. [Fam C §7630\(e\)\(2\)](#).

Notice to mother. When a father relinquishes a child for adoption or consents to the child's adoption, notice of the adoption proceeding must be given to the child's mother, unless her relationship to the child has been terminated previously by a court or she has voluntarily relinquished the child for adoption or consented to the adoption. [Fam C §7661](#).

Constitutional requirements. Notice to the birth parent is constitutionally required. See *In re B.G.* (1974) 11 C3d 679, 688–689, 114 CR 444. The notice must be reasonably calculated to apprise the parent of the pendency of the adoption proceeding and to afford the parent the opportunity to object. *In re Melinda J.* (1991) 234 CA3d 1413, 1418, 286 CR 239. Service by publication is sufficient only if the parent cannot be located despite a thorough, systematic investigation and inquiry, conducted in good faith. *David B. v Superior Court* (1994) 21 CA4th 1010, 1016, 26 CR2d 586.

Notice to DSS. Generally, when an adoption petition is filed, the clerk must give written notice of the petition to the Department of Social Services in Sacramento. See [Fam C §§8714\(b\), 8802\(a\)\(2\), 8912\(a\)](#). This notice requirement does not apply in a stepparent adoption.

4. [§130.56] Hearings

General considerations. All hearings in an adoption proceeding must be held in private, generally in chambers. The judge must exclude all persons except officers of the court, the parties, their attorneys, their witnesses, and representatives of the agencies who are present to perform their official duties under the adoption law. [Fam C §8611](#). If there are a large number of participants, the judge may clear the courtroom so that the hearing may be held there.

➡ **JUDICIAL TIP:** Many judges make time to review the adoption file a few days before the hearing on the adoption petition to familiarize themselves with the circumstances of the case and to ensure that all the required documentation has been filed. If a required document is not in the file, the judge (or the judge's clerk) may contact the party or agency responsible for filing the document and request that the document be brought to the hearing.

Required appearances. In general, the prospective adoptive parents and the child must appear at the hearing. See [Fam C §§8718, 8823, 8913, 9007](#). A prospective adoptive parent who is in the military or is serving in a recognized charitable or religious organization and is unable to attend the adoption hearing by reason of this service may appear by counsel under a power of attorney. See [Fam C §8613\(a\)](#). This provision also applies to the spouse of a prospective adoptive parent who resides with the prospective adoptive parent outside California. [Fam C §8613\(e\)](#).

The trial court has discretion to waive the personal appearance of the prospective adoptive parent when there is clear and convincing evidence that it is impossible or impracticable for the prospective adoptive parent to appear in person, and the court may permit the party to appear by counsel. [Fam C §8613.5](#).

If neither prospective parent is required to appear, the child need not appear; counsel may execute any document on the child's behalf that is required during the hearing. [Fam C §8613\(f\)](#). If none of the parties appears, the judge may not enter an adoption order until after a report and recommendation of the agency investigating the adoption has been filed with the court. [Fam C §8613\(g\)](#).

Examination by judge. The judge is required to examine all persons appearing in the proceeding. [Fam C §8612\(a\)](#). Each examination must be conducted separately, but in the physical presence of every other person unless the judge orders otherwise. [Fam C §8612\(a\)](#). The judge has the discretion to cause an examination of a prospective parent, other interested person, or witness to be made on deposition, as the judge deems

necessary. The petitioner is required to pay for the deposition. [Fam C §8613\(c\)](#).

5. [§130.57] Accounting

Except in a stepparent adoption, the petitioners must file a full accounting report with the court of all disbursements of anything of value made or agreed to be made by them (or on their behalf) in connection with (1) the birth of the child, (2) the child's placement with them, (3) any medical or hospital care received by the child's birth mother or the child in connection with the child's birth, and (4) any other expenses of either birth parent or the adoption. [Fam C §8610\(a\)](#). Use mandatory Judicial Council form ADOPT-230, Adoption Expenses. The report must be itemized in detail and must show the services that were received by the petitioners, by either birth parent or the child, or by any other person for whom payment was made. [Fam C §8610\(b\)](#). It must include the date of each payment, and the names and addresses of each attorney, physician or surgeon, hospital, licensed adoption agency, or other person or organization receiving any funds from the petitioners in connection with the adoption or placement of the child with them or participating in any way in the handling of those funds either directly or indirectly. [Fam C §8610\(b\)](#).

The report must be made under penalty of perjury and submitted to the court on or before the date set for the hearing on the adoption petition, unless a judge has granted an extension of time. [Fam C §8610\(a\)](#).

6. [§130.58] Consolidation of Adoption Proceeding With Guardianship Proceeding

If the child is the subject of a guardianship petition, that fact must be stated in the adoption petition, along with the caption and docket number of the guardianship petition, or a copy of the letters of guardianship or temporary guardianship may be attached. [Fam C §§8714\(e\), 8714.5\(f\)](#). The petitioners are required to notify the court of any petition for guardianship or temporary guardianship that is filed after the adoption petition is filed. [Fam C §8802\(d\)](#). The judge must consolidate the guardianship proceeding with the adoption proceeding. [Fam C §§8714\(e\), 8714.5\(f\), 8802\(d\), 8912\(c\), 9000\(d\)](#). The consolidated case shall be heard and decided in the court in which the adoption is pending. [Fam C §§8714.5\(f\), 8802\(d\)](#).

In general, adoption is preferred to guardianship. See *In re Josue G.* (2003) 106 CA4th 725, 734–735, 131 CR2d 92; *In re Ronell A.* (1996) 44 CA4th 1352, 1368–1369, 52 CR2d 474. A judge may consider guardianship, however, for a child who has been relinquished to an agency for adoption but is unlikely to be placed with an adoptive family. See *San*

Diego County Dep't of Public Welfare v Superior Court (1972) 7 C3d 1, 11–14, 101 CR 541.

7. [§130.59] Parental Agreement Regarding Treatment of Adopted Child

The prospective adoptive parents must execute and acknowledge an agreement, in writing, that they will treat the child in all respects as their lawful child, which is accomplished by completing and signing Judicial Council form ADOPT-210 (mandated for use in all courts). [Fam C §8612\(b\)](#). The signing of the form is generally done at the hearing on the adoption request.

If the prospective adoptive parent is permitted to appear by counsel (see [§130.56](#)), the form may be executed and acknowledged by counsel or executed by the parent before a notary public or other person authorized to take acknowledgments. [Fam C §8613\(b\)](#).

Some judges supplement the form by taking the agreement verbally to give a degree of ceremony to a very short, but often long-awaited, hearing. See script in [§130.129](#) as an example.

8. [§130.60] Order and Certificate of Adoption

If the judge is satisfied that the child's interest will be promoted by the adoption, the judge makes and enters an order of adoption. [Fam C §8612\(c\)](#). See mandatory Judicial Council form ADOPT-215, Adoption Order.

The order must contain the child's adopted name, but not the child's name before adoption. [Fam C §§8714\(f\), 8802\(e\), 8912\(d\), 9000\(e\)](#). The child may, but is not required to, take the family name of the adoptive parent(s). [Fam C §8618](#).

Many judges ask the petitioner's attorney to prepare the adoption order for submission to the judge at the hearing. Unless taking the matter under submission, the judge executes the order at the conclusion of the hearing and gives it to the clerk for filing and entry as a judgment.

Once an adoption order has been entered, the adoptive parents or the child may request the court clerk to issue a certificate of adoption that states the date and place of adoption, the child's birth date, the adoptive parents' names, and the name the child has taken. [Fam C §§8614, 9200\(c\)](#).

☛ **JUDICIAL TIP:** Often an adoption is a cause for celebration for the entire family. A judge may create some ceremony by asking each family member if he or she accepts the child into his or her family and by asking each family member to sign a ceremonial "consent to adopt."

9. [§130.61] Effect of Adoption

After adoption, the child and adoptive parents have the legal relationship of parent and child. They have all the rights and are subject to all the duties of that relationship. [Fam C §8616](#). The birth parents are relieved of all parental duties towards, and all responsibility for, the child and have no right over the child. [Fam C §8617](#). See *Marriage of Dunmore* (2000) 83 CA4th 1, 4–5, 98 CR2d 885 (parent's obligation to support child is terminated by adoption); see *County of Ventura v Gonzales* (2001) 88 CA4th 1120, 1122–1125, 106 CR2d 461 (order terminating parental rights severs parent-child relationship and deprives court of authority to order parent to pay child support).

Any guardianship of the person of the child terminates on his or her adoption. [Prob C §1600\(b\)](#). A parent-child relationship exists between the child and the adopting parents for purposes of intestate succession. [Prob C §6450\(b\)](#). In general, for purposes of intestate succession, the relationship between the child and the birth parents is terminated by adoption, with two exceptions which are set forth in [Prob C §6451\(a\)](#). See [Prob C §6451](#). Adoption terminates the visitation rights of relatives of a deceased parent unless the adoptive parent is a stepparent or grandparent. [Fam C §3102\(a\), \(c\)](#).

10. [§130.62] Confidentiality of Court Records

The petition, relinquishment of consent, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition must be filed in the office of the court clerk. [Fam C §8613\(d\)](#). These records are not open to inspection by any persons other than the parties to the adoption proceeding, their attorneys, and the DSS, except on a judge's written authority. [Fam C §9200\(a\)](#). A judge may only authorize inspection in exceptional circumstances and "for good cause approaching the necessitous." [Fam C §9200\(a\)](#). The records in a case in which the judge denies the petition for adoption are protected from inspection to the same extent as those in a case in which the judge grants the petition. See *Hubbard v Superior Court* (1961) 189 CA2d 741, 752, 11 CR 700.

The names of the child's birth parents (or any information tending to identify them) must be deleted from the records before they are provided to any person for inspection or copying. [Fam C §9200\(b\)](#).

D. Independent Adoptions

1. [§130.63] Selection of Prospective Adoptive Parents

An independent adoption is an adoption in which the prospective adoptive parents are selected personally by the child's birth parent rather than by an adoption agency. See [Fam C §§8524, 8539, 8801\(a\)](#). That is

not to say that the birth parent must “find” the prospective adoptive parents. An adoption facilitator may act as an intermediary between the birth parent and prospective adoptive parents. See [Fam C §§8623–8638](#). Any adoption facilitator who operates independently from a licensed public or private adoption agency or adoption attorney must comply with statutory requirements for registering with the department, posting bond, and fulfilling educational and work experience. [Fam C §8632.5](#).

The selection of the prospective adoptive parents must be made by the birth parent based on his or her personal knowledge of them and may not be delegated to an agent. [Fam C §8801\(a\)](#).

“Personal knowledge” includes the following about the prospective adoptive parents ([Fam C §8801\(b\)](#)):

- Their full legal names, ages, religion, race, or ethnicity;
- Their general area of residence or, on request, their address;
- The length of their marriage and number of previous marriages;
- Their employment;
- Whether other children or adults reside in their home;
- Whether there are other children who do not reside in their home; if so, their child support obligation for these children and any failure to meet this obligation;
- Any removals of children from their care because of abuse or neglect;
- Any health conditions that curtail their normal daily activities or that reduce their normal life expectancies; and
- Any convictions for crimes other than minor traffic violations.

2. [§130.64] Dual Representation of Birth and Adoptive Parents

Requirement of written consent. It is unethical for an attorney to undertake the representation of both the prospective adoptive parents and the birth parents of a child in any negotiations or proceedings in connection with an independent adoption unless a written consent is obtained from both parties. See [Fam C §8800](#). The written consent must include the following ([Fam C §8800\(d\)](#)):

- A notice to the birth parents of their right to have an independent attorney advise and represent them in the adoption proceedings, and that the prospective adoptive parents may be required to pay their reasonable attorney’s fees up to a maximum of \$500 unless the parties agree to a higher fee.

- A notice to the birth parents that they may waive their right to an independent attorney and may be represented by the attorney who represents the prospective adoptive parents.
- A waiver by the birth parents of representation by an independent attorney.
- An agreement that the attorney who represents the prospective adoptive parents will also represent the birth parents.

The written consent must be filed with the court before the birth parents' consent to the adoption is filed. [Fam C §8800\(i\)](#). Before the consent is signed, the attorney must advise the birth parents of their right to an independent attorney and that it is possible to waive this right. [Fam C §8800\(g\)](#). The attorney must also inform the prospective adoptive parents in writing that the birth parents can revoke their consent to the adoption (see [§130.69](#)), and that any funds expended in negotiations or proceedings in connection with the adoption are not reimbursable; the prospective adoptive parents must sign a statement indicating their understanding of this information. [Fam C §8800\(h\)](#).

Avoiding dual representation. An attorney's dual representation of both the birth and adoptive parents should be avoided, whether or not their written consent is obtained, whenever a birth parent displays the slightest reason for the attorney to believe any controversy might arise. See [Fam C §8800\(c\)](#). When a conflict of interest occurs, an attorney must (1) withdraw promptly from the case, (2) advise the parties to retain independent counsel, (3) refrain from taking positions in opposition to any of these former clients, and (4) maintain an impartial, fair, and open attitude toward the new attorneys. [Fam C §8800\(c\)](#).

Representation of birth parent. On the petition or motion of any party, or on the judge's own motion, a judge may appoint an attorney to represent a birth parent in negotiations or proceedings in connection with the adoption. [Fam C §8800\(e\)](#). When the birth parents retain an attorney to represent them in the adoption, the judge has the discretion to award them attorney's fees and costs for just cause and based on the parties' ability to pay those fees and costs. [Fam C §8800\(f\)](#).

3. [[§130.65](#)] Adoption Placement Agreement and Parental Consent

Advisement and counseling. The adoption service provider must advise each birth parent placing the child for adoption of his or her rights and, if desired, provide the parents with counseling under [Fam C §8801.5](#). [Fam C §8801.3\(a\)](#).

- **JUDICIAL TIP:** A failure to fulfill the advisement and counseling duties is not a basis for setting aside a birth parent's consent of

the adoption, but may give rise to a cause of action for malpractice or negligence against those professionals or agencies serving as adoption service providers that are responsible for fulfilling these duties. [Fam C §8801.5\(g\)](#).

Required signatures on adoption placement agreement. Each prospective adoptive parent, each birth parent placing the child for adoption, and the adoption service provider must sign an adoption placement agreement prescribed by the DSS. [Fam C §8801.3\(b\)](#). The “adoption service provider” may be a licensed private adoption agency, a licensed clinical social worker, or a licensed marriage and family therapist. [Fam C §8502\(a\)](#). Independent legal counsel for the birth parents may serve as the adoption service provider in certain circumstances. See [Fam C §8502\(c\)](#).

The birth parents must be advised of their rights at least ten days before signing the agreement, unless the adoption service provider finds exigent circumstances which must be set forth in the agreement. [Fam C §8801.3\(b\)\(1\)](#). Ordinarily, the agreement may not be signed until the birth mother has been discharged from the hospital. [Fam C §8801.3\(b\)\(2\)](#). Both the birth parents and the prospective adoptive parents must sign the agreement in the presence of an adoption service provider, who must forward the agreement and supporting documentation to the DSS or the delegated county adoption agency. [Fam C §8801.3\(b\)\(3\)–\(4\)](#). A birth parent who is outside California or the United States must sign the agreement before an adoption service provider or, for purposes of identification of the birth parent only, before a notary, or other person authorized to perform notarial acts in the state or country in which the birth parent is located. [Fam C §8801.3\(b\)\(6\)](#) (this provision does not apply to out-of-country adoptions).

4. Other Consent Requirements

a. [§130.66] Consent of Parent Not Placing Child for Adoption

Requirements for consent. If only one birth parent places the child for adoption, the consent of the other birth parent to the adoption must be obtained unless this parent’s parental rights have been terminated or an exception to the consent requirement applies (see [§130.49](#)). The consent must be signed in the presence of an agent of the DSS or of a delegated county adoption agency on a form prescribed by the DSS. [Fam C §8814\(a\)](#). This form must be filed with the clerk of the court in which the adoption petition has been filed. [Fam C §8814\(a\)](#). The consent becomes a permanent consent on the 31st day after it is signed. [Fam C §8814.5\(a\)\(3\)](#).

Consent by minor. A birth parent who is a minor has the right to sign a consent, which is not subject to revocation because of his or her minority. [Fam C §8814\(d\)](#).

Consent by parent outside California. A birth parent who is outside California may sign the consent before a notary or other person authorized to perform notarial acts; in such a case, the consent of the DSS or of the delegated county adoption agency is also necessary. [Fam C §8814\(c\)](#).

Refusal to give consent. If this birth parent refuses to give the required consent, the judge must order the child restored to the custody and care of the birth parent. [Fam C §8804\(c\)](#). A number of cases have held that a judge has no discretion to consider whether the child has bonded with the prospective adoptive family, which family will provide a better home for the child, or whether returning the child to the birth parent is in the child's best interests. *In re Timothy W.* (1990) 223 CA3d 437, 445–446, 272 CR 906; *In re Baby Boy M.* (1990) 221 CA3d 475, 487, 272 CR 27. A mandatory return of the child, however, is subject to the child's constitutional rights. *Guardianship of Zachary H.* (1999) 73 CA4th 51, 65, 86 CR2d 7. Thus, if a child has had a stable placement with prospective adoptive parents since birth, the child has a constitutional right to continue this placement, and this right is not superseded by the mandatory return provision of [Fam C §8804\(c\)](#). 73 CA4th at 68 (proceeding in which couple with whom child had lived since being placed with them at birth by mother sought guardianship of child after father successfully resisted petition to terminate his parental rights).

b. [§130.67] Consent of Department or County Adoption Agency

In an independent adoption in which the consent of the birth parent or parents is not necessary (see [§130.49](#)), the Department of Social Services (DSS) or the delegated county adoption agency must file its consent to the adoption with the court before the hearing on the adoption petition. [Fam C §8816](#).

The petitioners or the birth parents may appeal the failure or refusal of the DSS or the agency to file or give its consent to the adoption. [Fam C §8820\(a\)\(2\)](#), (b). Any appeal must be filed in the court in which the adoption petition is filed. [Fam C §8820\(b\)](#). The clerk must immediately notify the DSS or the agency of the appeal and that it has ten days within which to file a report of its findings and the reasons for its failure or refusal to consent to the adoption. [Fam C §8820\(b\)](#). Although [Fam C §8820](#) refers to the right to “appeal” the failure or refusal of the DSS or the agency to consent to the adoption, the statute does not provide for a hearing on the issue. A judge may determine this issue at the hearing on

the adoption petition. See *Adoption of McDonald* (1954) 43 C2d 447, 458, 274 P2d 860; discussion in §130.73.

After considering the report of the DSS or the agency, if the judge concludes that the child's welfare will be promoted by the adoption, the judge may grant the petition without the consent of the DSS or the agency. *Fam C §8820(c)*; *Adoption of McDonald, supra*, 43 C2d at 452, 457–458.

5. [§130.68] Waiver of Right To Revoke Consent

The birth parent or parents may sign a waiver of the right to revoke consent on a form prescribed by the DSS in the presence of any of the following (*Fam C §8814.5(a)(2)(A)*):

- (i) A representative of the DSS or delegated county adoption agency.

- (ii) A judicial officer of a court of record if the birth parent is represented by independent legal counsel.

- (iii) An adoption service provider if the birth parent or parents are represented by independent legal counsel. The adoption service provider shall ensure that the waiver is delivered to the department, the petitioners, or their counsel no earlier than the end of the business day following the signing of the waiver. The adoption service provider shall inform the birth parent that during this time period he or she may request that the waiver be withdrawn and that, if he or she makes that request, the waiver shall be withdrawn.

(C) The waiver of the right to revoke consent may not be signed until an interview has been completed by the DSS or delegated county adoption agency unless the waiver of the right to revoke consent is signed in the presence of a judicial officer of a court of record or an adoption service provider as specified in this section.—If the waiver is signed in the presence of a judicial officer, the interview and the witnessing of the signing of the waiver shall be conducted by the judicial officer. If the waiver is signed in the presence of an adoption service provider, the interview shall be conducted by the independent legal counsel for the birth parent or parents. If the waiver is signed in the presence of an adoption service provider, the waiver shall be reviewed by the independent legal counsel who (*Fam C §8814.5(a)(2)(C)*):

- (i) Counsels the birth parent or parents about the nature of his or her intended waiver; and

- (ii) Signs and delivers to the birth parent or parents and DSS a certificate in substantially the following form: I, (name of attorney), have counseled my client, (name of client), on the nature and legal effect of the waiver of right to revoke consent to adoption. I am so disassociated from the interest of the petitioner(s)/prospective adoptive parent(s) as to be in a position to advise my client impartially and confidentially as to the consequences of the waiver. (Name of client) is aware that California law provides for a 30-day period

during which a birth parent may revoke consent to adoption. On the basis of this counsel, I conclude that it is the intent of (name of client) to waive the right to revoke, and make a permanent and irrevocable consent to adoption. (Name of client) understands that he/she will not be able to regain custody of the child unless the petitioner(s)/prospective adoptive parent(s) agree(s) to withdraw their petition for adoption or the court denies the adoption petition.

The consent may not be revoked after a waiver has been signed. [Fam C §8814.5\(b\)](#).

6. [§130.69] Withdrawal of Consent

Right to withdraw consent. After signing a consent to the adoption under either [Fam C §8801.3](#) (see [§130.65](#)) or [Fam C §8814](#) (see [§130.66](#)), the birth parents have 30 days to file a revocation of consent with the DSS or the delegated county adoption agency if they have not also signed a waiver of the right to revoke consent. [Fam C §§8801.3\(c\), 8814.5\(a\)\(1\), \(b\)](#). If they do not file a revocation within this 30-day period, their consent becomes a permanent consent and may not be revoked. [Fam C §§8801.3\(c\), 8814.5\(a\)\(3\), \(b\), 8815\(a\)](#). A birth parent may seek equitable relief on the ground that his or her consent was obtained by mistake, fraud, duress, or undue influence. See *Adoption of Jennie L.* (1980) 111 CA3d 422, 430–431, 168 CR 695; *Arnold v Howell* (1950) 98 CA2d 202, 206–208, 219 P2d 854 (relief sought after adoption order was entered).

Return of child. Within the 30-day period for revoking consent, the birth parents may request return of the child, in which case the child must be immediately returned. [Fam C §8815\(b\)](#). If the persons with whom the child has been placed have concerns that the birth parents are unfit or present a danger of harm to the child, their only option is to report their concerns to the investigating adoption agency and appropriate child welfare agency; these concerns do not change the obligation to return the child. [Fam C §8815\(c\)](#). On revocation of consent, the judge must order the child restored to the custody and care of the birth parents. [Fam C §8804\(c\)](#).

Reinstatement of consent. After the birth parents revoke but do not regain custody or fail to make efforts to exercise their rights under [Fam C §8815\(b\)](#), they may sign a written, notarized statement reinstating the original consent and deliver the statement to the DSS or the delegated county adoption agency. [Fam C §8814.5\(a\)\(1\)](#). In such event, the revocation of consent is void and a new 30-day period begins. [Fam C §8814.5\(a\)\(1\)](#). When the birth parents have regained custody, the revocation of consent is void and a new 30-day period begins. [Fam C §8814.5\(a\)\(1\)](#).

7. [§130.70] Adoption Request Checklist

In reviewing a request for an independent adoption (see Judicial Council form ADOPT-200, Adoption Request, mandated for use by all courts), the judge should ensure that it complies with the following requirements:

(1) *Proper petitioner.* The request may be filed by (Fam C §8802(a)(1)):

- A person with whom the child has been placed for adoption (see §130.65).
- An adult who is related to the child or the child's half sibling by blood or affinity, including all relatives whose status is preceded by the words "step," "great," "great-great," or "grand," or the spouse of any of these persons even if the marriage has been terminated by death or dissolution.
- A person named in the will of a deceased parent as an intended adoptive parent when the child has no other parent.
- A legal guardian who has been the child's legal guardian for more than one year or, if the child is alleged to have been abandoned under Fam C §7822, a legal guardian who has been the child's legal guardian for more than six months. Fam C §8802(a)(1)(D)(i)–(ii).

The guardianship must have been in effect for *three* years if the birth parent nominated the guardian for a purpose other than adoption or if the guardianship was established under Welf & I C §360. Fam C §8802(a)(1)(D)(iii). On the age requirements for a prospective adoptive parent, see §130.47.

(2) *Proper court.* The request may be filed in the superior court for the county in which the petitioner or the child resides, or in which an office of the agency that placed the child is located. Fam C §§200, 9211, 8802(a)(1).

(3) *Proper caption.* The caption of the request must contain the petitioners' names, but not the child's name. Fam C §8802(c).

(4) *Required allegations.* The petition must

State the child's sex, birth date, and name before adoption. Fam C §8802(c).

Allege that the petitioners will promptly file information required by the DSS in the investigation of the proposed adoption with the DSS or the delegated county adoption agency. Fam C §8802(b). The omission of this allegation does not affect the court's jurisdiction to proceed or the validity of any adoption order based on the petition. Fam C §8802(b).

(5) *Adoptive placement agreement.* A copy of the adoptive placement agreement (see §130.65) must be attached to the petition. Fam C §8802(b)(2).

(6) *Postadoption agreement.* If petitioner has entered into a postadoption contact agreement (see mandatory Judicial Council form ADOPT-310) with the birth parent (see Fam C §8616.5), that agreement, signed by the participating parties, must be attached to the petition. Fam C §8802(b)(3).

When an adoption request is filed

- The clerk must immediately notify the Department of Social Services (DSS) in Sacramento, in writing, of the pendency of the adoption proceeding and of any subsequent action taken. Fam C §8802(a)(2).
- The petitioners must file a copy of the request with the DSS district office or with the delegated county adoption agency responsible for investigating the adoption, along with the names, addresses, and telephone numbers of all parties to be interviewed in connection with the adoption (if known). Fam C §8808(c).

8. [§130.71] Withdrawal or Dismissal of Request

If the petitioners move to withdraw the petition or to dismiss the adoption proceedings, the clerk must immediately notify the DSS in Sacramento. Fam C §8802(a)(2). The DSS or the delegated county adoption agency must file a full report with the court recommending a suitable plan for the child, and must appear before the court for the purpose of representing the child. Fam C §8804(a). Notwithstanding the withdrawal or dismissal of the petition, the court may retain jurisdiction over the child to make any order for the child's custody that it deems to be in the child's best interest. Fam C §8804(b).

On withdrawal or dismissal, if the judge does not return the child to the birth parents, the judge must commit the child to the care of the DSS or the delegated county adoption agency for the purpose of arranging an adoptive placement or of making a suitable plan. Fam C §8805.

9. [§130.72] Concealment or Removal of Child From County

During the pendency of the adoption proceeding, the child may not be concealed within the county in which the proceeding is pending. Fam C §8803(a)(1). In order to remove the child from that county, the petitioners or other interested persons must first obtain court permission after giving written notice to the agency responsible for investigating the proposed adoption. Fam C §8803(a)(2). A violation of these prohibitions constitutes a violation of Pen C §280. Fam C §8803(c).

A judge may grant permission for removal of the child from the county on proof that notice was given to the agency if the agency does not file any objection within 15 days after notice was given. [Fam C §8803\(a\)\(2\)](#). If the agency files an objection within the 15-day period, the court must immediately set the matter for hearing on the petitioners' request and give the parties reasonable notice of the hearing by certified mail, return receipt requested, to their addresses as shown in the records of the adoption proceeding. [Fam C §8803\(a\)\(2\)](#). The judge may grant permission to remove the child, subject to any limitations that appear to be in the child's best interest on finding that the agency's objections are without good cause. [Fam C §8803\(a\)\(2\)](#).

The requirement of court permission for removal does not apply to removal of the child from the county for 30 days or less, unless a notice of recommendation of denial of the petition has been personally served on the petitioners or a judge has issued an order prohibiting the child's removal from the county pending consideration of the petitioners' suitability, the care provided the child, or the availability of the legally required consents to the adoption. [Fam C §8803\(b\)\(1\)](#). The requirement also does not apply when the child has been returned to and remains in the custody and control of the child's birth parent(s). [Fam C §8803\(b\)\(2\)](#).

10. [§130.73] Hearing on Recommended Denial of Adoption Petition

The general requirements for adoption hearings are discussed in [§130.56](#). Additional requirements apply when the DSS or the delegated county adoption agency recommends that the petition be denied. On receipt of a report containing a finding by the DSS or the agency that the petitioners' home is not suitable for the child or that the required consents are not available, and recommending that the petition be denied, the clerk must immediately refer the report to a judge for review. [Fam C §8822\(a\)](#). The court must set a date for a hearing on the petition and give reasonable notice of the hearing to the DSS or the agency, the petitioners, and the birth parents, by certified mail, return receipt requested, to their addresses as shown in the proceeding. [Fam C §8822\(b\)](#).

The prospective adoptive parents and the child are required to appear at the hearing. [Fam C §8823](#). The DSS or the agency must appear to represent the child. [Fam C §§8804\(a\), 8822\(c\)](#).

A hearing *must* be held. A judge may not deny the petition based on the recommendation of the DSS without first affording the petitioner the opportunity to be heard. *Adoption of Baby Girl B.* (1999) 74 CA4th 43, 50–56, 87 CR2d 569. A trial-like hearing is required, in which the judge's decision is based on the testimony of live witnesses, not merely on written declarations. 74 CA4th at 51–52. A prospective adoptive parent with

whom the child has been placed for adoption has a constitutional right to notice and a full hearing before the adoptive placement may be terminated, at least in the absence of urgent or emergency circumstances. 74 CA4th at 51. Even in a case of imminent danger to the child, the adoptive parent has a constitutional right to a posttermination hearing. 74 CA4th at 53.

The judge is not required to follow the recommendation of the DSS or the agency and may grant the petition if the judge finds that the adoption is in the child's best interests, except when the required consents have not been obtained. *Adoption of McDonald* (1954) 43 C2d 447, 456-457, 274 P2d 860. If the judge accepts the recommendation, the judge must commit the child to the care of the DSS or the agency for the purpose of arranging an adoptive placement or of making a suitable plan. Fam C §8805.

11. [§130.74] Payment of Costs and Fees

Various provisions govern the payment of the costs and fees of the adoption, including the following:

- The judge may award attorney's fees and costs to the birth parents for just cause and based on the parties' ability to pay those fees and costs. Fam C §8800(f).
- At the birth parent's request, the prospective adoptive parents must pay the birth parent's advisement and counseling fees. Fam C §8801.5(f).
- Any request by a birth parent for payment by the prospective parents of attorney's fees, medical fees and expenses, counseling fees, or living expenses of the birth mother must be in writing. Fam C §8812. The birth parent must provide the prospective parents with written receipts for any money provided to the birth parent, which the prospective parents must submit to the court when the accounting report (see §130.57) is filed. Fam C §8812.
- The petitioners must pay a fee that the department or agency may waive or reduce if the petitioners are low income, and making the payment would be detrimental to the child's welfare. Fam C §8810.

E. Stepparent Adoptions

1. [§130.75] In General

In a stepparent adoption, the spouse of the child's birth parent seeks to adopt the child. The birth parent retains his or her custody and control of the child. Fam C §8548. Stepparent adoption includes adoption by a

domestic partner. [Fam C §9000\(g\)](#). In this type of adoption, the judge may disregard the general requirement that an adopting parent must be at least ten years older than the child (see [§130.47](#)) if the judge is satisfied that the adoption is in the parties' best interest and in the public interest. See [Fam C §8601](#). Once the petition for adoption is granted, the petitioner becomes the child's parent for all purposes under [Fam C §8616](#). *Lopez v Martinez* (2000) 85 CA4th 279, 284, 102 CR2d 71. Any visitation rights granted to the parents of the child's noncustodial birth parent may be terminated by the adoption. 85 CA4th at 283–288.

2. [[§130.76](#)] Adoption Request

To begin adoption proceedings, the stepparent or domestic partner must file an adoption request on Judicial Council form ADOPT-200 in the superior court for the county in which the stepparent resides. [Fam C §§200, 9000\(a\)–\(b\)](#). The mandated Judicial Council form may be used for agency, independent, and international adoptions as well as stepparent and domestic partner adoptions. See Judicial Council form ADOPT-200, Adoption Request.

3. [[§130.77](#)] Investigation and Report

A judge may make an adoption order only after considering the report and recommendation filed by a probation officer, qualified court investigator, licensed clinical social worker, licensed marriage family therapist, or county welfare department. [Fam C §9001\(a\)](#). Neither the Department of Social Services nor the county adoption agency is involved in the investigation of a stepparent adoption.

The judge may order a home study, *i.e.*, a physical investigation of the premises where the child is residing. [Fam C §9001\(b\)](#) (study not otherwise required). The investigating agency or any interested person may request such an order. [Fam C §9001\(b\)](#).

The prospective adoptive parent is liable for all reasonable costs of the adoption, including investigation costs unless the fee is deferred, waived, or reduced by the court or investigating agency on the grounds that payment would cause economic hardship to the prospective adoptive parent detrimental to the child's welfare. [Fam C §9002](#).

4. [[§130.78](#)] Consent Requirements

The general requirements regarding consent of the birth parents and of the child if over 12 years of age must be satisfied. See [§130.48](#).

The birth parent's consent must be given on a form prescribed by the DSS. See [Fam C §9004](#). It must be signed in the presence of a notary public, court clerk, probation officer, qualified court investigator, or

county welfare department staff member of any California county. [Fam C §9003\(a\)](#). The person before whom the consent is signed must immediately file it with the clerk who must immediately notify the probation officer or county welfare department. [Fam C §9003\(a\)](#).

The statement in the consent that the person giving consent is entitled to sole custody of the child and when the consent is acknowledged before the notary public, court clerk, probation officer, qualified court investigator, or county welfare department staff member, is prima facie evidence of the person's right to sole custody and of his or her sole right to consent. [Fam C §9003\(c\)](#).

➡ **JUDICIAL TIP:** The judge may not proceed with the adoption without first determining that the consent of the other birth parent is not required. If one parent claims sole custody, the judge may ask the parent to present the court with a copy of the custody decree.

A birth parent who is a minor has the right to sign a consent, which is not subject to revocation because of his or her minority. [Fam C §9003\(d\)](#). A birth parent who is outside California may sign the consent before a notary or other person authorized to perform notarial acts. [Fam C §9003\(b\)](#).

If the noncustodial birth parent refuses to give the required consent, the judge must dismiss the adoption petition. [Fam C §9006\(b\)](#). But see *Adoption of Christopher S.* (1987) 197 CA3d 433, 436–437, 242 CR 866 (noncustodial parent's consent was not necessary under [Fam C §8604\(b\)](#) because of his failure to support and communicate with child for more than one year); discussion in §§130.15–130.18.

5. [§130.79] Withdrawal of Consent

The consent of a birth parent to the adoption may not be withdrawn without court approval. [Fam C §9005\(a\)](#). The birth parent may request that approval by motion or by filing a petition which may be in any form, as long as it is in writing and sets forth the reasons for withdrawing consent. [Fam C §9005\(a\)](#).

The clerk must set the matter for hearing, and give notice of the hearing to the investigating agency, the stepparent, and the birth parents by certified mail, return receipt requested, to their addresses as shown in the proceeding, at least ten days before the hearing. [Fam C §9005\(b\)](#). The agency must file a full report with the court before the hearing, and must appear at the hearing to represent the child's interests. [Fam C §9005\(c\)](#). At the hearing, the parties may appear in person or with counsel. The hearing must be held in chambers and reported. [Fam C §9005\(d\)](#).

The judge may approve withdrawal of the consent only if the judge finds that withdrawal is reasonable under all the circumstances and is in the child's best interest. In determining the child's best interest, the judge must consider the following (Fam C §9005(d)):

- The child's age,
- The extent of bonding with the stepparent,
- The extent of bonding or the potential to bond with the birth parent, and
- The birth parent's ability to provide adequate and proper care and guidance to the child.

The judge must determine the child's best interest solely from the standpoint of the child, and should not consider the feelings and desires of the contesting parties except as they affect the child's best interest. *Adoption of Matthew B.* (1991) 232 CA3d 1239, 1264, 284 CR 18. The judge may not grant relief merely because the judge finds that withdrawal of consent would not be detrimental; the judge must affirmatively find that withdrawal would serve the child's best interest. *Adoption of Matthew B.*, *supra* (judge properly refused withdrawal of consent based on relative assessment of parties' bonding to child and their fitness as parents).

If the judge approves withdrawal of the consent, the judge must dismiss the adoption proceeding. Fam C §9005(d).

A judge's order granting or withholding approval of a withdrawal of consent may be appealed in the same manner as a juvenile court order declaring a person to be a ward of that court. Fam C §9005(e).

6. [§130.80] Withdrawal or Dismissal of Request

If the petitioner moves to withdraw the request or to dismiss the adoption proceedings, the clerk must immediately notify the investigating agency. Fam C §9006(a). No particular grounds for withdrawal or dismissal are specified by statute.

If a birth parent has refused to give the required consent (see §130.78), the judge must dismiss the adoption petition. Fam C §9006(b).

7. [§130.81] Hearing

Once the agency investigating the proposed adoption has filed its report and recommendation, the petition may be set for hearing. See Fam C §9001(a) (judge may not rule on the petition until he or she has considered this report). See discussion in §130.77.

The stepparent and child must appear at the hearing. Fam C §9007. The stepparent is not required to file an accounting. Fam C §8610(c). See §130.57. In determining whether to grant the petition in a stepparent

adoption, the judge must consider the best interests of the child. *Adoption of Christopher S.* (1987) 197 CA3d 433, 439, 242 CR 866.

On the general requirements for hearings in adoption proceedings, see §130.56.

F. Agency Adoptions

1. [§130.82] In General

When adoptive placement may be made. In an agency adoption, the adoptive placement is made by a licensed adoption agency after one of the following has occurred:

- The birth parent has relinquished the child to the agency or the Department of Social Services (DSS) for adoption. See Fam C §§8700, 8704; discussion in §130.83.
- The child is referred to the agency for adoptive placement because the child has been declared free from the custody and control of the birth parent(s). See Fam C §7893.
- The child is referred to the agency by the juvenile court because the parental rights of the birth parents have been terminated under Welf & I C §366.26.
- The entry of a judge's order establishing that the agency has the right to custody and control of the child and the authority to place the child for adoption because the birth parents (whose consent to the adoption is required) are deceased. See Fam C §8705(a).

Role of DSS or agency. The DSS or the agency to which the child has been relinquished for adoption (by either relinquishment or termination of parental rights) is responsible for the child's care and is entitled to exclusive custody and control of the child until a judge grants an order of adoption. Fam C §8704(a). Any placement for temporary care or for adoption made by the DSS or the agency may be terminated in its discretion at any time before an order of adoption is made. In such event, the child must be returned promptly to the physical custody of the DSS or the agency. Fam C §8704(a).

Role of judge. A judge may not substitute his or her judgment for that of the DSS because the Legislature has given the DSS exclusive custody and control of the child under this provision and the discretion to make placement decisions. *In re Harry N.* (2001) 93 CA4th 1378, 1397, 114 CR2d 46. The judge is limited to reviewing whether the DSS abused its discretion in placing the child or in determining that the placement, once made, remains appropriate. Without a showing that the placement decision by the DSS is patently absurd or unquestionably not in the child's best interests, the judge may not interfere and disapprove of the placement. *Los*

Angeles County Dep't of Children & Family Servs. v Superior Court (1998) 62 CA4th 1, 10, 72 CR2d 369; *Department of Social Servs. v Superior Court* (1997) 58 CA4th 721, 724–725, 68 CR2d 239.

2. [§130.83] Relinquishment of Child to Agency

Requirements for relinquishment. In an agency adoption, a birth parent voluntarily gives up his or her parental rights by *relinquishing* the child to the DSS or a licensed adoption agency rather than by *consenting* to the adoption as in an independent or stepparent adoption. See [Fam C §8700](#). A valid relinquishment makes the birth parent's consent to the adoption unnecessary. See [Fam C §8606\(d\)–\(e\)](#).

To relinquish the child for adoption, either birth parent must sign a written statement before two witnesses; the statement must be acknowledged before an authorized official of the DSS or the agency. [Fam C §8700\(a\)](#). If the relinquishment recites that the person making it is entitled to sole custody of the child, this is prima facie evidence of the person's right to sole custody and sole right to relinquish. [Fam C §8700\(a\)](#).

☛ **JUDICIAL TIP:** The judge may not proceed with the adoption without first determining that the consent of the other birth parent is not required. On the factors to consider, see [§§130.48–130.54, 130.84](#). If one parent claims sole custody, the judge may ask the parent to present the court with a copy of the custody decree.

Relinquishment by minor. A birth parent who is a minor has the right to relinquish the child for adoption, and the relinquishment is not subject to revocation because of his or her minority. [Fam C §8700\(b\)](#).

Relinquishment by parent outside California. A birth parent who resides outside California may relinquish the child by a written statement signed before a notary on a form prescribed by the DSS and previously signed by an authorized official of the DSS or the agency signifying the willingness of the DSS or the agency to accept the relinquishment. [Fam C §8700\(c\)](#). If both the parent and child reside outside California, this procedure may be used only if the following requirements are met:

- Before signing the relinquishment, the parent must have received, from a representative of an agency licensed or otherwise approved to provide adoptions services under the laws of the parent's state of residence, the same counseling and advisement services as if the parent resided in California. [Fam C §8700\(d\)\(1\)](#).
- The relinquishment must be signed before a representative of an agency licensed or otherwise approved to provide adoption services under the laws of the parent's state of residence whenever possible or before a licensed social worker on a form prescribed by

the DSS, and previously signed by an authorized official of the DSS or agency, that signifies the willingness of the DSS or the agency to accept the relinquishment. [Fam C §8700\(d\)\(2\)](#).

Filing relinquishment. The relinquishment has no effect until a certified copy is sent to and filed with the DSS. The agency shall inform the birth parent that during this time period he or she may request that the relinquishment be withdrawn and that, if he or she makes the request, the relinquishment will be withdrawn. [Fam C §8700\(e\)\(1\)](#). It becomes final 10 business days after receipt of the filing by the department unless it becomes final earlier when the department sends written acknowledgment of receipt earlier than 10 days or later because there is a pending court case or other cause beyond the control of the department. [Fam C §8700\(e\)\(1\)\(A\), \(B\)](#). After the relinquishment is filed and final, it may be rescinded only by the mutual consent of the DSS or the agency and the birth parent or parents relinquishing the child. [Fam C §8700\(e\)\(2\)](#); see [22 Cal Code Regs §§35167–35170](#); *In re Michael R.* (2006) 137 CA4th 126, 138, 39 CR3d 773 (mother placed minor with agency for adoption just a few days after his birth, intending at that time that guardian and her husband would adopt minor, but mother and agency mutually agreed to rescission of mother's relinquishment of her parental rights to agency after guardian and her husband divorced). The filing of the relinquishment with the DSS terminates the parental rights and responsibilities of the relinquishing parents with respect to the child. [Fam C §8700\(j\)](#). There are two exceptions. First, a parent may bring an action to set aside the relinquishment for cause, *e.g.*, fraud, misrepresentation, duress, undue influence, or constructive fraud. See *Tyler v Children's Home Soc'y* (1994) 29 CA4th 511, 529, 548–551, 35 CR2d 29; *In re Cheryl E.* (1984) 161 CA3d 587, 599–602, 207 CR 728. Second, the relinquishing parent may name the persons with whom he or she intends that adoptive placement be made. [Fam C §8700\(f\)](#). See *In re David H.* (1995) 33 CA4th 368, 384, 39 CR2d 313 (parents whose rights have been terminated under [Welf & I C §366.26](#) have no right to choose adoptive family).

A relinquishment may be effective even when the birth parent fails to complete an item on the relinquishment form supplied by the DSS. A relinquishment is valid, even if incomplete, if it is a knowing, intelligent waiver of the birth parent's parental rights. *Adoption of Baby Boy D.* (2001) 93 CA4th 1, 11, 112 CR2d 700. When the DSS recommends against an adoption or refuses to consent to an adoption, the court has the responsibility of determining whether the child's welfare would be promoted by granting the adoption petition. 93 CA4th at 11. The DSS's refusal to acknowledge the relinquishment is not determinative of its validity. Instead, the court must determine whether the relinquishment substantially complies with the statutory requirements. 93 CA4th at 13.

Rescission of relinquishment. If the child is not placed in this person's home (or is removed from this person's home before the adoption is granted), the DSS or the agency must mail notice to the relinquishing parent by certified mail, return receipt requested, within 72 hours of the decision not to place the child for adoption or to remove the child from the home. Fam C §8700(g). The relinquishing parent has 30 days from the date the notice was mailed to rescind the relinquishment. Fam C §8700(h). The DSS or the agency must rescind the relinquishment if the relinquishing parent so requests within the 30-day period. Fam C §8700(h)(1). If the relinquishing parent does not request rescission during the 30-day period, the DSS or the agency must select adoptive parents for the child. Fam C §8700(h)(2). The DSS or the agency and the relinquishing parent may agree on another person with whom the child should be placed for adoption within this 30-day period by rescinding the original relinquishment and completing a new relinquishment. Fam C §8700(h)(3).

Relinquishment of dependent child to private adoption agency. The birth mother of a child who has been adjudged a dependent of the juvenile court may relinquish the child to a private adoption agency, subject to the juvenile court's broad power to limit a parent's control over a dependent child, which includes the parent's ability to relinquish the child to a private adoption agency; the proper standard for the court to employ in making this determination is the best interests of the child at the time of the hearing. *Teresa J. v Superior Court* (2002) 102 CA4th 366, 369, 374–375, 125 CR2d 506 (rejecting contention that dependent child may only be relinquished to public adoption agency).

3. [§130.84] Termination of Nonrelinquishing Parent's Parental Rights

There cannot be an adoption without a judicial determination that the nonrelinquishing parent's rights have been terminated or that consent is not required. See discussion in §§130.14–130.44, 130.48–130.54. The petition may be filed by the relinquishing parent, the agency or person to whom the child has been or is to be relinquished, the person having physical or legal custody of the child, or the prospective adoptive parent. See Fam C §7662.

If the other parent is the birth mother or presumed father, a proceeding must be brought under Fam C §§7800–7895 (see §§130.35–130.44).

If the other parent is an alleged natural (not presumed) father, a proceeding must be brought under the Uniform Parentage Act (see §§130.19–130.34). If the birth mother identifies the alleged natural father or he has been identified to the satisfaction of the court and he cannot be

located, the agency must petition the court to terminate his parental rights under [Fam C §§7662 and 7666](#), and request that the court dispense with notice of the proceeding to the alleged natural father. [22 Cal Code Regs §35128\(d\)\(3\)\(B\)–\(C\)](#).

4. Selection of Prospective Adoptive Parents

a. [§130.85] Preference for Placement With Relative or Foster Parents

The agency must first consider adoptive placement of the child in the home of a relative. [Fam C §8710](#). The child's foster parents must be considered when ([Fam C §8710](#)):

- A relative is not available;
- Placement with an available relative is not in the child's best interest; or
- Placement would permanently separate the child from other siblings who are being considered for adoption or are in foster care, and an alternative placement would not require permanent separation.

For the foster parents to be considered, the judge must find all the following:

- The child has been in foster care with the foster parents for more than four months. [Fam C §8710\(a\)\(1\)](#).
- The child has substantial emotional ties to the foster parents. [Fam C §8710\(a\)\(2\)](#).
- The child's removal from the foster home would be seriously detrimental to the child's well-being. [Fam C §8710\(a\)\(3\)](#).
- The foster parents have made a written request to be considered to adopt the child. [Fam C §8710\(a\)\(4\)](#).

Foster parents are not entitled to an exclusive preference after relatives; other prospective adoptive parents are entitled to equal consideration. See [Fam C §8710\(a\)](#).

In most instances in which a child is with foster parents, these provisions will not apply because the child will have been adjudged a dependent of the juvenile court ([Fam C §8710\(c\)](#)). Juvenile court law, however, provides an even stronger preference for adoption by a foster parent. See [Welf & I C §366.26\(k\)](#); discussion in California Judges Benchguide 104: *Juvenile Court Dependency Selection and Implementation Hearing* §104.63 (Cal CJER).

In the case of an Indian child, placement preferences must be considered according to those established in [Welf & I C §361.31](#), and if

the child's foster parents or other prospective adoptive parents do not fall within those preferences, the court must find clear and convincing evidence of good cause to deviate from those standards. [Fam C §8710\(b\)](#); see discussion in §§ [130.105–130.112](#).

b. [§130.86] Assessment or Home Study If Prospective Adoptive Parent Is Foster Parent or Relative

A restricted assessment or home study may be used if the prospective adoptive parent is a foster parent with whom the child has lived for at least six months or is a caregiver who is a relative and who has had an ongoing and significant relationship with the child. The use of this procedure is at the discretion of the DSS or the licensed adoption agency unless the court with jurisdiction over the child orders otherwise. Under this procedure the assessment or home study may require only the following:

- A criminal records check of the relative caregiver or foster parent. [Fam C §8730\(a\)](#); see § [130.88](#).
- A determination that the relative caregiver or foster parent has sufficient financial stability to support the child and ensure that any adoption assistance program payment or other government assistance to which the child is entitled is used exclusively to meet the child's needs. In making this determination, only the caregiver's or foster parent's experience while the child was in his or her care may be considered. The caregiver or foster parent is required to provide verification of employment records or income, or both. [Fam C §8730\(b\)](#).
- A determination that the relative caregiver or foster parent has not abused or neglected the child while the child has been in his or her care, and has fostered the child's healthy growth and development. This determination must include a review of the caregiver's or foster parent's disciplinary practices to ensure that they are age appropriate and do not physically or emotionally endanger the child. [Fam C §8730\(c\)](#).
- A determination that there is no likelihood that the relative caregiver or foster parent will abuse or neglect the child in the future, and that the caregiver or foster parent can protect the child, ensure necessary care and supervision, and foster the child's healthy growth and development. [Fam C §8730\(d\)](#).
- A determination that the relative caregiver or foster parent can address any racial or cultural issues that might affect the child's well-being. [Fam C §8730\(e\)](#).

- An interview with the relative caregiver or foster parent, with each individual residing in the home, and with the child to be adopted. [Fam C §8730\(f\)](#); see [22 Cal Code Regs §35183](#).

If the prospective adoptive parent is a foster parent, the assessment or home study may not be initiated until the child has resided in the foster parent's home for at least six months. [Fam C §8731](#).

A report of a medical examination of the foster parent or the relative caregiver must be included in the assessment unless the DSS or the licensed adoption agency determines that, based on other available information, the report is unnecessary. [Fam C §8732](#). The assessment must require certification that the applicant and each adult residing in the applicant's home has received a test for communicable tuberculosis. [Fam C §8732](#).

c. [§130.87] Consideration of Race and Ethnic Background

The DSS or the licensed adoption agency may not categorically deny to any person the opportunity to become an adoptive parent solely on the basis of the person's or child's race, color, or national origin. [Fam C §8708\(a\)\(1\)](#). The agency may not delay or deny the placement of a child for adoption on the basis of the adoptive parent's or child's race, color, or national origin. [Fam C §8708\(a\)\(2\)](#). The DSS or the agency may, however, consider the child's religious background in determining an appropriate placement. [Fam C §8709\(a\)](#). These provisions do not affect the application of the [Indian Child Welfare Act \(25 USC §§1901 et seq\)](#) to an adoption involving an Indian child. [Fam C §§8708\(b\), 8709\(b\)](#). See [§§130.105–130.112](#).

d. [§130.88] Consideration of Parent's Criminal Record

The DSS or the licensed adoption agency must require each person filing an application for adoption to be fingerprinted, and must secure from an appropriate law enforcement agency that person's criminal record. [Fam C §8712\(a\)](#); [22 Cal Code Regs §35184](#). The DSS or the agency must consider any criminal record in its evaluation of the prospective adoptive parent. In its report to the court (see [§130.98](#)), it must include an assessment of the effects of any criminal history on the parent's ability to provide adequate and proper care and guidance to the child. [Fam C §8712\(b\)](#).

Under no circumstances shall DSS or a licensed adoption agency give final approval for an adoptive placement in any home where the prospective adoptive parent or any adult living in the prospective adoptive home has either of the following ([Fam C §8712\(c\)\(1\)](#)):

- A felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography; or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery. For purposes of this subdivision, crimes involving violence means those violent crimes contained in [Health & S C §1522\(g\)\(1\)\(A\)\(i\), \(B\)](#); or
- A felony conviction that occurred within the last five years for physical assault, battery, or a drug- or alcohol-related offense.

This provision is effective October 1, 2008, and shall remain operative only to the extent that compliance with its provisions is required by federal law as a condition of receiving funding under Title IV-E of the federal [Social Security Act \(42 USC §§670–680\)](#). [Fam C §8712\(c\)\(2\)](#).

e. [§130.89] Registration With Statewide Exchange System

The DSS or other licensed adoption agency may not deny or delay the placement of a child solely because the prospective, approved adoptive family resides outside the jurisdiction of the agency. [Fam C §8708\(a\)\(3\)](#). For purposes of this provision, an approved adoptive family means a family approved under California’s adoptive applicant assessment standards. If the assessment was conducted in another state under that state’s standards, the California placing agency must determine whether the other state’s standard’s substantially meet the standards and criteria established in California’s adoption regulations. [Fam C §8708\(a\)\(3\)](#).

In order to preclude delays or denials, the DSS must establish a statewide exchange system that provides for interjurisdictional matching of children awaiting adoption and approved adoptive families. [Fam C §8710.2](#). If there is no adoptive placement plan for a child with an approved adoptive family within the jurisdiction of the DSS or the licensed adoption agency, then the DSS or the agency must register the child with the statewide exchange system. [Fam C §8710.1](#).

If the DSS or the licensed adoption agency has approved a family for adoption and that family may be appropriate for placement of a child who has been adjudged a dependent child of the juvenile court, the DSS or the agency must register the family with the statewide exchange system unless the family refuses to consent to the registration, or a specific child or children have already been identified for adoptive placement with the family. [Fam C §8710.3](#).

The DSS is required to ensure that information regarding families and children registered with the statewide exchange system is accessible by licensed adoption agency personnel throughout California. [Fam C §8710.4\(a\)](#). The DSS must provide for secure Internet, telephone, and facsimile access by such personnel. [Fam C §8710.4\(a\)](#). Information about

children maintained by the statewide exchange system is confidential, and may not be disclosed to any parties other than authorized adoption agency personnel, except when consent to disclosure has been received in writing from the birth parents or the court that has jurisdiction. [Fam C §8710.4\(b\)](#).

5. [§130.90] Submission of Medical Report to Prospective Adoptive Parents

The DSS or the agency may not place a child for adoption until it has submitted a written report on the child's medical background and, if available, on the medical background of the child's biological parents, to the prospective adoptive parents and they have acknowledged receiving the report, in writing. [Fam C §8706\(a\)](#); [22 Cal Code Regs §35195](#). The report on the child's background must contain all known diagnostic information, including current medical reports on the child, psychological evaluations, scholastic information, and all known information regarding the child's developmental history and family life. [Fam C §8706\(b\)](#).

6. Adoption Petition Filed by Relative

a. [§130.91] Petition Requirements

A relative who desires to adopt a child may file a petition for adoption in the superior court for the county in which the petitioner resides. [Fam C §§200, 8714.5\(b\)](#). If the child has been adjudged a dependent of the juvenile court under [Welf & I C §300](#), and thereafter freed for adoption by that court, the petition may be filed either in the county in which the petitioner resides or in the county in which the child was freed for adoption. [Fam C §8714.5\(b\)](#). The caption of the petition must contain the name of the relative who is petitioning. [Fam C §8714.5\(e\)](#). The petition must state the child's name, sex, and birth date. [Fam C §8714.5\(e\)](#). See Judicial Council form ADOPT-200, Adoption Request.

A "relative" is an adult who is related to the child or the child's half sibling by blood or affinity, including all relatives whose status is preceded by the words "step," "great," "great-great," or "grand," or the spouse of any of these persons, even if the marriage has been terminated by death or dissolution. [Fam C §8714.5\(h\)](#).

b. [§130.92] Postadoption Contact Agreement

If the adopting relative has entered into a postadoption contact agreement with the birth parent, this agreement, signed by the participating parties, must be attached to and filed with the petition. [Fam C §§8714\(c\), 8714.5\(d\), 8802\(a\)\(3\), 8912\(e\), 9000\(f\)](#). Such an agreement is intended to ensure an achievable level of continuing contact when

contact is beneficial to the child and the agreement is entered into voluntarily by the birth relatives, including the birth parents or an Indian tribe, and the adoptive parents. [Fam C §8616.5\(a\)](#). Nothing in the adoption laws of this state may be construed to prevent the adopting parents, the birth relatives, the child's Indian tribe if the case is governed by ICWA, and the child from voluntarily entering into a written agreement to permit continuing contact between the parties, and the agreement is found to be in the best interests of the child at the time that the adoption petition is granted. [Fam C §8616.5\(b\)\(1\)](#).

The agreement may provide for (1) visitation between the child and the birth parent (and other birth relatives or, if appropriate, Indian tribe), (2) future contact between the birth parent and the child and the adoptive parent, and (3) the sharing of information about the child in the future. [Fam C §8616.5\(b\)\(2\)](#); [Cal Rules of Ct 5.400\(d\)](#). See mandatory Judicial Council form ADOPT-310, Contact After Adoption Agreement. The terms of any postadoption contact agreement must be limited to the sharing of information about the child unless the child has an existing relationship with the birth relative. [Fam C §8616.5\(b\)\(3\)](#); [Cal Rules of Ct 5.400\(d\)\(9\)](#).

If the child is 12 years old or older, the child's written consent to the agreement is required unless the judge finds by a preponderance of the evidence that the agreement is in the child's best interests and waives this consent requirement. [Fam C §8616.5\(d\)](#); [Cal Rules of Ct 5.400\(e\)\(1\)](#). As part of its report to the court, the DSS or the agency participating as a party or joining in the adoption petition must include a summary of the agreement and a recommendation whether it is in the child's best interest. [Cal Rules of Ct 5.400\(g\)](#). The agreement is subject to approval by the judge. See [§§130.101–130.102](#).

A postadoption contact agreement may be initiated by the birth parent(s), other birth relatives, or the prospective adoptive parents. When a birth parent contemplates relinquishing a child for adoption by a relative, the birth parent may condition the relinquishment on the adoptive parent's agreement to allow the birth parent to maintain some form of open relationship with the child. But in an involuntary dependency-related transfer of custody, the birth parent has no cognizable interest in dictating the terms of the resulting adoption. *In re Kimberly S.* (1999) 71 CA4th 405, 412–413, 83 CR2d 740. In either situation the prospective adoptive parent may want the birth parent's continued involvement with the child, at some level, particularly when the adoptive parent is a relative of the birth parent. The adoptive parent may view this involvement as beneficial for the child and as lessening tensions in the circumstances of an involuntary, dependency-related transfer of custody. 71 CA4th at 412.

No prospective adoptive parent or birth relative may be required by court order to enter into a postadoption contact agreement. [Cal Rules of Ct 5.400\(b\)](#).

c. [§130.93] Notice Requirements

The clerk must immediately notify the DSS in Sacramento of the pendency of the proceeding and of any subsequent action taken. [Fam C §8714.5\(c\)](#).

7. [§130.94] Adoption Petition Filed by Nonrelative

To commence adoption proceedings, the prospective adoptive parents with whom the child has been placed for adoption by the DSS or a licensed adoption agency must file a petition. See [Fam C §8704\(b\)](#). The petition must be filed with the superior court for the county in which the petitioners reside, or, if the child has been freed for adoption by the juvenile court, in the superior court for the county in which the petitioners reside or for the county in which the child was freed for adoption. [Fam C §§200, 8714\(a\)](#). The caption of the petition must contain the petitioners' names, but not the child's name, and the petition must state the child's sex, birth date, and name before adoption. [Fam C §8714\(c\)](#). See mandatory Judicial Council form ADOPT-200, Adoption Request.

The clerk must immediately notify the DSS in Sacramento of the pendency of the proceeding and of any subsequent action taken. [Fam C §8714\(b\)](#).

8. [§130.95] Withdrawal or Dismissal of Petition

If the petitioners move to withdraw the petition or to dismiss the adoption proceedings, the clerk must immediately notify the DSS in Sacramento. [Fam C §8719](#). No particular grounds for withdrawal or dismissal are specified by statute.

9. [§130.96] Concealment or Removal of Child From County

A child who has been freed for adoption may not be removed from the county in which he or she was placed, by any person who has not petitioned to adopt the child, without first obtaining the written consent of the DSS or the licensed adoption agency that is responsible for the child. [Fam C §8713\(a\)](#).

During the pendency of the adoption proceeding, the child may not be concealed within the county in which the proceeding is pending. [Fam C §8713\(b\)\(1\)](#). In addition, the child may not be removed from that county unless the petitioners or other interested persons first obtain a judge's permission for the removal after giving written notice to the agency that is

responsible for the child. [Fam C §8713\(b\)\(2\)](#). A violation of these prohibitions constitutes a violation of [Pen C §280](#). [Fam C §8713\(d\)](#).

A judge may grant permission for removal of the child from the county on proof that notice was given to the agency if the agency does not file any objection within 15 days after notice was given. [Fam C §8713\(b\)\(2\)](#). If the agency files an objection within the 15-day period, the court must immediately set the matter for hearing on the petitioners' request and give the parties reasonable notice of the hearing by certified mail, return receipt requested, to their addresses as shown in the records of the adoption proceeding. [Fam C §8713\(b\)\(2\)](#). The judge may grant permission to remove the child, subject to any limitations that appear to be in the child's best interest, on finding that the agency's objections are without good cause. [Fam C §8713\(b\)\(2\)](#).

The requirement of a judge's permission for removal does not apply to removal of the child from the county for 30 days or less, unless a notice of recommendation of denial of the petition has been personally served on the petitioners or a judge has issued an order prohibiting the child's removal from the county pending consideration of the petitioners' suitability, the care provided the child, or the availability of the legally required consents to the adoption. [Fam C §8713\(c\)\(1\)](#). The requirement also does not apply when the child has been returned to and remains in the custody and control of the child's birth parent or parents, or when written consent for the removal has been obtained from the DSS or the agency. [Fam C §8713\(c\)\(2\)–\(3\)](#).

10. [§130.97] Removal of Child From Petitioners' Home

After an adoption petition is filed, the DSS or the licensed adoption agency may remove the child from the prospective adoptive parents' home only with a judge's approval. [Fam C §8704\(b\)](#). To seek this approval, the DSS or the agency must file a motion with the court, and must give notice of the motion to the prospective adoptive parents. [Fam C §8704\(b\)](#). The motion must be supported by an affidavit stating the grounds on which the DSS or the agency seeks removal. [Fam C §8704\(b\)](#).

11. [§130.98] Report of Department or Agency

The DSS or the licensed adoption agency, whichever is a party to or joins in the petition, must submit a full report of the facts of the case to the judge, which includes a recommendation that the adoption petition be either granted or denied. [Fam C §8715\(a\)](#); [22 Cal Code Regs §35211\(b\), \(d\)\(7\)](#); see [Fam C §8715\(d\)](#) (DSS may also submit report in case in which licensed adoption agency is party or joins in adoption petition). The report must generally be filed within 180 days of the filing of the adoption petition unless the court has granted an extension of time. [22 Cal Code](#)

[Regs §35211\(b\)\(1\)](#). However, the agency must file the report immediately if (1) there is a serious question about the suitability of the prospective adoptive parents, (2) there is a serious question about the care provided to the child, (3) the prospective adoptive parents have indicated a desire to withdraw the adoption petition, or (4) a petition for the adoption of a child for whom the agency has care and custody is filed by persons with whom the agency has not signed an adoptive placement agreement. [22 Cal Code Regs §35213](#).

If an adoption petition by a relative has been filed with a postadoption contact agreement (see [§130.92](#)), the report must address whether this agreement has been entered into voluntarily and is in the child's best interests. [Fam C §8715\(c\)](#); [22 Cal Code Regs §35211\(d\)\(5\)](#). It must include a statement recommending approval or disapproval of the agreement. [22 Cal Code Regs §35211\(d\)\(5\)\(A\)](#). The report must also recommend whether the court should grant postadoption contact privileges in the proposed agreement, and it must advise the adopting relative and the birth parent if it will recommend that the court should not grant these contact privileges. [22 Cal Code Regs §35209\(b\)–\(c\)](#). If the child has been adjudged a dependent of the juvenile court under [Welf & I C §300](#) and has thereafter been freed for adoption by the juvenile court, the report must describe whether the requirements of [Welf & I C §16002\(e\)](#) have been met, and what, if any, plan exists for facilitating postadoptive contact between the child and his or her siblings and half-siblings. [Fam C §8715\(b\)](#). At the time of filing the report, the DSS or the agency must give a copy of the report to the petitioners or their attorney. [Fam C §8717](#); [22 Cal Code Regs §35211\(c\)](#).

At the time of filing a favorable report, the DSS or the agency may require the petitioners to pay a fee unless it defers, waives, or reduces the fee, which it may do if (1) necessary for the placement of a special-needs child, (2) its payment would cause economic hardship to the prospective adoptive parents detrimental to the child's welfare, or (3) the child has been in the parents' foster care for at least one year. [Fam C §8716](#).

12. [[§130.99](#)] Hearing on Unfavorable Recommendation by Department or Agency

The general requirements for adoption hearings are discussed in [§130.56](#). Additional requirements apply when the DSS or the licensed adoption agency recommends that the petition be denied. On receipt of this report, the clerk must immediately refer it to a judge for review. [Fam C §8720\(a\)](#). The court must set a date for a hearing on the petition, and give reasonable notice of the hearing to the DSS or the agency, the petitioners, and the birth parents (if necessary), by certified mail, return receipt requested, to their addresses as shown in the proceeding. [Fam C](#)

§8720(b). The DSS or the agency must appear to represent the child. Fam C §8720(c).

If the DSS or the agency refuses to consent to the child's adoption by the persons with whom the DSS or the agency placed the child for adoption, the judge may, nevertheless, order the adoption if the judge finds that the refusal to consent is not in the child's best interest. Fam C §8704(b); *Adoption of McDonald* (1954) 43 C2d 447, 458, 460, 274 P2d 860; *Adoption of Baby Girl B.* (1999) 74 CA4th 43, 51, 87 CR2d 569.

13. [§130.100] Order of Adoption by Relative

The order of adoption must contain the child's adopted name and not the name the child had had before the adoption. Fam C §8714(f). If requested by the adopting relative or by the child if 12 years of age or older, the order must also contain the child's name before adoption. Fam C §8714.5(g).

14. Approval of Postadoption Contact Agreement Between Relative and Birth Parent

a. [§130.101] Statutory Requirements

A postadoption contact agreement entered into between the adopting relative and the birth parent to provide for continuing contact between the birth parent or an Indian tribe and the child, as well as the adopting relative, is subject to approval by a judge. See Fam C §8616.5(a)–(b). When granting the adoption petition, the judge may approve the postadoption contact agreement if the judge finds that the agreement was entered into voluntarily and is in the child's best interests. Fam C §8616.5(b); Cal Rules of Ct 5.400(c). In the case of an Indian child, the court may order the parties into family mediation services if the prospective adoptive parent fails to negotiate a postadoption contact agreement in good faith. Fam C §8616.5(k)(1). Moreover, if the parties fail to negotiate a postadoption contact agreement in good faith for an Indian child, the court may modify prior orders as necessary to ensure the best interests of the Indian child, including initiating guardianship proceedings or changing an adoptive placement. Fam C §8616.5(k)(2). Enforcement of the agreement is under the continuing jurisdiction of the court that granted the adoption petition. Fam C §8616.5(f); Cal Rules of Ct 5.400(h). The agreement may be modified or terminated under specified circumstances. Fam C §8616.5(h); Cal Rules of Ct 5.400(i). A judge may not set aside an adoption order, rescind a relinquishment, or modify an order to terminate parental rights or any other prior court order because of a party's failure to comply with a postadoption contact agreement. Fam C §8616.5(k); Cal Rules of Ct 5.400(k). The Judicial

Council has mandatory forms of request (ADOPT-315), answer (ADOPT-320), and order (ADOPT-325) for use in proceedings to enforce, change, or end a postadoption contact agreement. See [Cal Rules of Ct 5.400\(h\)–\(j\)](#).

b. [§130.102] Application of Requirements to Juvenile Court Proceedings

In terminating a mother's parental rights to her dependent minor child in a proceeding under [Welf & I C §366.26](#), the juvenile court is not required to provide the mother with notice and an opportunity to enter into a postadoption contact agreement with the prospective adoptive parents before terminating her parental rights. *In re Kimberly S.* (1999) 71 CA4th 405, 411–415, 83 CR2d 740; *In re Zachary D.* (1999) 70 CA4th 1392, 1397–1398, 83 CR2d 407. Although the termination of parental rights does not preclude entry into such an agreement under [Fam C §§8616.5 and 8714.5](#), those sections do not impose an obligation on a juvenile court to order the department to provide birth parents or others with an opportunity to enter into a postadoption contact agreement or to notify the birth parents of this opportunity. *In re Kimberly S.*, *supra*, 71 CA4th at 412; *In re Zachary D.*, *supra*, 70 CA4th at 1397. The parties are not foreclosed from entering into such an agreement after termination of the mother's parental rights. *In re Kimberly S.*, *supra*, 71 CA4th at 414–415; *In re Zachary D.*, *supra*, 70 CA4th at 1398–1399.

G. [§130.103] Interstate Adoptions

The [Interstate Compact on Placement of Children \(ICPC\)](#) ([Fam C §§7900–7912](#)) applies if an agency desires to bring a child to, or send a child from, California for placement in foster care or as a preliminary to a possible adoption. See [Fam C §7901](#), art 3(a)–(b); *In re Emmanuel R.* (2001) 94 CA4th 452, 458, 114 CR2d 320. The ICPC does not apply in the case of an Indian child. [Fam C §7907.3](#). It is unclear whether the ICPC applies to independent adoptions between private parties. See *Adoption of Zachariah K.* (1992) 6 CA4th 1025, 1038, 8 CR2d 423. It does not apply to an out-of-state placement of a child with a parent (see *In re Johnny S.* (1995) 40 CA4th 969, 976–977, 47 CR2d 94; *Tara S. v Superior Court* (1993) 13 CA4th 1834, 1837, 17 CR2d 315) or to an out-of-state visitation order (see *In re Emmanuel R.*, *supra*, 94 CA4th at 459–465; *In re Luke L.* (1996) 44 CA4th 670, 682, 52 CR2d 53).

Before sending or bringing a child into a receiving state, the sending agency must furnish the appropriate public authorities in the receiving state with written notice of its intention to send, bring, or place the child in the receiving state. [Fam C §7901](#), art 3(b). Any public officer or agency in a receiving state may request from the sending agency all supporting information it deems necessary to carry out the purpose and policy of the

ICPC. [Fam C §7901, art 3\(c\)](#). The child must not be sent or brought into the receiving state until the appropriate public authorities in that state notify the sending agency in writing that the proposed placement does not appear to be contrary to the child’s interests. [Fam C §7901, art 3\(d\)](#). A court-ordered placement of a child that does not comply with these provisions, when applicable, is invalid. *In re Luke L., supra*. An order that is made contingent on subsequent compliance with the ICPC is likewise invalid, because the ICPC does not permit contingent or conditional placement orders. 44 CA4th at 682.

Under the ICPC, the sending agency retains jurisdiction over the child until the child is adopted, which includes the power to cause the return of the child or the child’s transfer to another location and custody. [Fam C §7901, art 5\(a\)](#).

The ICPC provides for sanctions if its provisions are violated. See [Fam C §7901, art 4](#).

H. [§130.104] Intercountry Adoptions

Intercountry adoptions involve the adoption of foreign-born children for whom federal law makes a special immigration visa available. [Fam C §8527](#). The foreign agency is responsible for obtaining children who are legally free for adoption under the laws of its country and who are eligible under United States immigration law. See [22 Cal Code Regs §35297\(a\)\(1\)](#). The California adoption agency is responsible for the assessment of applicants and the selection of adoptive parents, whether or not the adoption is to be completed in California or abroad. Once the child arrives in California, the adoption proceeds in much the same way as any agency adoption (see [§§130.82–130.102](#)). The procedures applicable to intercountry adoptions are contained in [Fam C §§8900–8920](#).

I. Native American Adoptions

1. [§130.105] Application of Indian Child Welfare Act

The [Indian Child Welfare Act](#) (ICWA) is a federal statutory scheme that governs Indian child custody proceedings. [25 USC §§1901–1923](#). It establishes minimum federal standards, both procedural and substantive, that govern the removal of Indian children from their families. *In re Alicia S.* (1998) 65 CA4th 79, 81, 76 CR2d 121. The ICWA applies to any Family Code proceeding that may result in the adoption of an Indian child, the termination of parental rights of the parents of an Indian child, or a custodial proceeding that grants custody of an Indian child to a person other than a parent or Indian custodian when the child cannot be returned upon demand. [Fam C §§170\(c\), 175, 177, 3041, 7541, 7600 et seq, 7660 et seq, 7800 et seq, 8500 et seq, 8600, 8700 et seq, 8800 et seq, and 9000 et](#)

seq; Cal Rules of Ct 5.480; 25 USC §§1901–1923. The purpose of the ICWA is to promote the stability and security of Indian tribes and families by establishing specific standards that must be met before an Indian child may be removed from his or her family. See Fam C §175; 25 USC §§1901–1902; *Mississippi Band of Choctaw Indians v Holyfield* (1989) 490 US 30, 32–37, 109 S Ct 1597, 104 L Ed 2d 29.

The ICWA provides for a system of dual state and tribal jurisdiction over Indian child custody proceedings. 65 CA4th at 82. Tribal courts have exclusive jurisdiction over proceedings involving Indian children who reside or are domiciled on a reservation. Fam C §177(a); Welf & I C §305.5; Cal Rules of Ct 5.483; 25 USC §1911(a). Concurrent but presumptively tribal jurisdiction exists over Indian children who are not domiciled on the reservation; state court proceedings for adoption or termination of parental rights must be transferred to the tribal court unless “good cause” exists, either parent objects, or the tribe declines jurisdiction. Fam C §177(a); Welf & I C §305.5; Cal Rules of Ct 5.483; 25 USC §1911(b).

Under Fam C §175, in all Indian child custody proceedings as defined in the ICWA, the judge must strive to promote the stability and security of Indian tribes and families, comply with the ICWA, and seek to protect the child’s best interest. Fam C §175(b). The judge must also consider that there is no resource more vital to the continued existence and integrity of an Indian tribe than its children, and that California has an interest in protecting Indian children who are members of, or eligible for membership in, an Indian tribe. Fam C §175(a)(1). In addition, the judge must consider that it is in the interest of an Indian child that the child’s membership in his or her tribe and connection to the tribal community be encouraged and protected. Fam C §175(a)(2). A determination by an Indian tribe that an unmarried person who is under 18 years of age and who is either a member of an Indian tribe or eligible for membership and is a biological child of a member of the tribe constitutes a significant political affiliation with the tribe, and requires the application of the ICWA to the proceedings. Fam C §175(c). For purposes of the ICWA, the Indian tribe determines whether the child is an Indian child, and the tribe’s determination that the child is or is not a member of or eligible for membership in the tribe is conclusive. *In re Robert A.* (2007) 147 CA4th 982, 988, 55 CR3d 74.

If the ICWA does not apply, the Department of Social Services (DSS) or local agency charged with making adoptive placements has exclusive authority to make placement decisions for the child. *In re Jullian B.* (2000) 82 CA4th 1337, 1345, 99 CR2d 241.

2. [§130.106] Children Covered by ICWA

The ICWA applies to an Indian child under the age of 18 who is either a member of a federally recognized Indian tribe (see [Fam C §175\(c\)](#); [25 USC §1903\(8\)](#)), or is eligible for membership in such a tribe and is the biological child of a tribal member. [Fam C §175\(c\)](#); [25 USC §1903\(4\)](#). An “Indian custodian” is an Indian person who has custody of the child under tribal or state law or to whom temporary physical custody and control of the child by the child’s parent has been given. [Fam C §170\(a\)](#); [25 USC §1903\(6\)](#).

The ICWA gives the child’s Indian tribe exclusive jurisdiction over termination of parental rights and adoption proceedings involving an Indian child residing on the reservation or an Indian child who is a ward of the tribal court. See [Fam C §177](#); [Welf & I C §305.5](#); [Cal Rules of Ct 5.483](#); [25 USC §§1903\(1\), 1911\(a\)](#). If the child does not reside on the reservation, the tribe has exclusive jurisdiction only if the child is domiciled on the reservation. [Fam C §177](#); [Welf & I C §305.5](#); [Cal Rules of Ct 5.483\(a\)\(2\)](#); [25 USC §1911\(a\)](#). If the child’s mother is domiciled on the reservation, the child is deemed to be domiciled there as well, even if the child was not born on the reservation, has never lived on the reservation, and was relinquished at birth to non-Indian adoptive parents. See *Mississippi Band of Choctaw Indians v Holyfield* (1989) 490 US 30, 48–49, 109 S Ct 1597, 104 L Ed 2d 29.

If the tribal court does not have exclusive jurisdiction because the Indian child is not a resident of or domiciled on the reservation, nor a ward of another tribal court, the family court must transfer jurisdiction to the tribal court, absent good cause, upon request by the parent, Indian custodian, or the child’s tribe. [Fam C §177](#); [Welf & I C §305.5](#); [Cal Rules of Ct 5.483\(b\)](#); [25 USC §1911\(a\)–\(b\)](#). Once a case is transferred to tribal court, the state court loses jurisdiction in the matter. *In re M.M.* (2007) 154 CA4th 897, 912–913, 65 CR3d 273.

3. [§130.107] ICWA Requirements

- Before filing a petition, application, or any request that could result in adoption, in a declaration freeing a child from the custody of the parent(s), or in the termination of parental rights, the party seeking the order must ask the child (if the child is old enough), the parents, the Indian custodian or guardian, and available family members or others who would reasonably know, whether the child is or may be an Indian child. See *In re Alice M.* (2008) 161 CA4th 1189, 1198–1199, 74 CR3d 863 (the “is or may be involved” standard of certainty, which triggers the duty of inquiry, is a lesser standard than the “is involved” standard requiring formal notice to

the Indian tribes). The requesting party must complete the Indian Child Inquiry Attachment (Judicial Council form ICWA-010(A)) and attach it to the petition. The requesting party must also complete item 7 on mandatory Judicial Council form ADOPT-200, indicating whether the child may have Indian ancestry, and attach it to mandatory Judicial Council form ADOPT-220, Adoption of Indian Child, if the answer is yes. If the court fails to ask a parent about his or her Indian heritage, a limited reversal of an order or judgment and remand for proper inquiry and any required notice may be necessary. *In re A.B.* (2009) 164 CA4th 832, 839, 79 CR3d 580 (no reversal when form for sibling revealed no Indian ancestry).

- The parent(s), Indian custodian, or guardian should complete Parental Notification of Indian Status (Judicial Council form ICWA-020) before the first court appearance, if possible, or when ordered to do so by the court at the first court appearance. [Fam C §177\(a\)](#); [Welf & I C §224.3\(a\)](#); [Cal Rules of Ct 5.481\(a\)](#). If the parent(s) do not appear at the first court appearance, the court must order the requesting party to use reasonable diligence to find the parents and have them complete Judicial Council form ICWA-020. [Cal Rules of Ct 5.481\(a\)](#).
- The court, petitioner, adoption service provider, adoption agency, and court-connected investigator all have an affirmative and continuing duty to inquire whether a child is or may be an Indian child. [Fam C §177\(a\)](#); [Welf & I C §224.3\(a\)](#); [Cal Rules of Ct 5.481\(a\)](#).
- If any person required by ICWA to inquire whether the child is or may be an Indian child knows or acquires “reason to know” that the child is an Indian child, they then have the duty to make further inquiry to: (1) ask family members; (2) contact the Bureau of Indian Affairs; and (3) contact the tribe and anyone else who might reasonably have information about the child’s Indian heritage. [Fam C §177\(a\)](#); [Welf & I C §224.3\(c\)](#); [Cal Rules of Ct 5.481\(a\)\(4\)](#).
- A party has “reason to know” a child is an Indian child if: (1) the child, an Indian tribe, an Indian organization, an attorney, an agency, or member of the child’s extended family says or provides information to anyone involved in the case suggesting that the child is an Indian child; (2) the child or child’s family or Indian custodian live in a predominantly Indian community; or (3) the child or child’s family has received services or benefits from a tribe or services available to Indians. [Fam C §177](#); [Welf & I C §224.3\(b\)](#); [Cal Rules of Ct 5.481\(a\)\(5\)](#).

- The court may sanction any party who falsifies or conceals a material fact, bearing on whether the child is an Indian child, or who counsels a party to do so. [Fam C §180\(f\)](#); [Welf & I C §224.2\(e\)](#).
- Notice is required to be sent when it is known or there is “reason to know” that a child is an Indian child, and Judicial Council form ICWA-030 must be sent to the child’s parents or guardians, the Indian custodian (if any), the tribe, the Sacramento office of the Bureau of Indian Affairs (if applicable), and the Secretary of the Interior (if applicable) as early as possible. [Fam C §180](#); [Welf & I C §224.2](#); [Cal Rules of Ct 5.481\(b\)](#); *In re Alice M.*, *supra*, 161 CA4th at 1198–1199 (information provided by mother of child in dependency proceeding, that child was or may have been member of, or eligible for membership in, an Apache and/or Navajo tribe, triggered specific notice procedures, rather than only a duty of further inquiry, since mother identified tribes; information “suggesting” child was a member of a tribe was sufficient).
- Notice must be sent to the child’s parents, including adoptive parents, the guardian, the Indian custodian (if any), and the tribal chairman of all of the child’s potential tribe(s), unless the tribe has designated another agent for service. The list of designated agents for ICWA service may be found at www.doi.gov/bia/ICWA%20Tribal%20Agents%2008-02.pdf. If the party knows the child’s tribe, notice must be sent to the Secretary of the Interior. See, *e.g.*, *In re J.T.* (2007) 154 CA4th 986, 993–994, 65 CR3d 320 (county agency was required to send notice to all federally recognized Cherokee and Sioux tribes after mother identified her possible Indian heritage as Sioux and Cherokee, even though the agency had provided proper notice to the Bureau of Indian Affairs, because statute mandates notice to all tribes of which the child may be a member or eligible for membership). If the child’s tribe is not known, notice must be sent to the Sacramento area director of the Bureau of Indian Affairs. [Fam C §180](#); [Welf & I C §224.2](#); [Cal Rules of Ct 5.481\(b\)](#).
- Contents of the notice must comply with all statutorily listed requirements and be completed on mandatory Judicial Council form ICWA-030, Notice of Child Custody Proceeding for Indian Child, including attachments and copies of the petition. [Fam C §180](#); [Welf & I C §224.2](#); [Cal Rules of Ct 5.481\(b\)](#).
- Notice must be sent by registered or certified mail, return receipt requested, or personal service. If a tribe intervenes in a case, notice may be sent thereafter to the tribe in the same manner as to the

other parties. [Fam C §180](#); [Welf & I C §§224.2, 224.3](#); [Cal Rules of Ct 5.481\(b\)](#).

- Notice is proven by filing the following with the court: (1) copies of all notices, (2) certified mail receipts, (3) all return receipts, and (4) all responses from a tribe or the Bureau of Indian Affairs. [Fam C §180\(d\)](#); [Welf & I C §224.2\(c\)](#); [Cal Rules of Ct 5.482\(b\)](#).
- Notice must ensure that the tribe will be afforded the opportunity to assert its rights under the ICWA irrespective of the positions taken by the parents, the Indian custodian, or the state agencies, by providing complete and accurate information. [Fam C §180](#); [Welf & I C §224.2](#); [Cal Rules of Ct 5.481\(b\)](#).
- The court may not hold a hearing until at least 10 days after receipt of notice by the child's parents, Indian custodian, and tribe(s), and the parents, Indian custodian, and tribe are entitled up to 20 additional days to prepare for a hearing. [25 USC §1912\(a\)](#); [Fam C §180\(a\)](#); [Welf & I C §224.2\(d\)](#); [Cal Rules of Ct 5.482\(a\)](#).
- A failure to comply with the notice requirement is reversible error, unless the tribe has participated in the proceeding or expressly indicated its lack of interest in participating. [25 USC §1914](#); see, e.g., *In re Alice M.*, *supra*, 161 CA4th at 1201 (incorrectly addressed notices sent to three tribes in dependency proceeding did not substantially comply with ICWA, requiring reversal of termination of mother's parental rights; although county department of social and employment services received signed return receipts, tribes did not respond, and notices were not sent to tribal chairpersons or designated agents); *In re Marinna J.* (2001) 90 CA4th 731, 734–739, 109 CR2d 267 (actual notice is required; mere awareness of proceedings is insufficient). See *In re Karla C.*, *supra*, 113 CA4th at 174 (when proper notice is not given, court's order is voidable).
- Under the ICWA, the tribe determines whether the child is an Indian child; its determination is conclusive. See, e.g., *In re Robert A.* (2007) 147 CA4th 982, 988, 55 CR3d 74; *Alicia B. v Superior Court* (2004) 116 CA4th 856, 865, 11 CR3d 1.
- The ICWA permits intervention by the child's parents, Indian custodian, and tribe at any point in state court child custody proceedings. [25 USC §1911\(c\)](#); [Fam C §177\(a\)](#); [Welf & I C §224.4](#); [Cal Rules of Ct 5.482\(e\), 5.534\(i\)](#).
 - In a relinquishment case, the tribe may intervene on behalf of a tribal member relative of the child. [Fam C §8620\(c\)](#).

- The tribe is encouraged to provide notice to the DSS at least five days before the hearing to determine whether a final adoption order is to be granted, indicating whether it intends to intervene in the proceeding either on its own behalf or on behalf of a tribal member who is a relative of the child. [Fam C §8620\(e\)](#).
- The tribe may be represented by counsel or may designate a nonattorney to act as tribal representative for the proceeding. [Fam C §177\(a\)](#); [Welf & I C §§224.2, 224.4](#); [Cal Rules of Ct 5.482\(e\), 5.534\(i\)](#).
- If the tribe does not formally intervene as a party, it may still seek permission to exercise rights listed in [Cal Rules of Ct 5.524\(i\)\(2\)](#).
- If the tribe seeks jurisdiction over the proceeding, the judge must transfer the proceeding to the tribal court unless there is a showing of “good cause” for retaining jurisdiction. See [25 USC §1911\(b\)](#); [Fam C §177](#); [Welf & I C §305.5](#); [Cal Rules of Ct 5.483\(b\)](#). Once a case is transferred to tribal court, the state court loses jurisdiction in the matter. *In re M.M.* (2007) 154 CA4th 897, 912–913, 65 CR3d 273.
- Courts must give full faith and credit to the public acts, records, and judicial proceedings of an Indian tribe that apply to Indian child custody proceedings to the same extent that courts give full faith and credit to the public acts, records, and judicial proceedings of other entities. [25 USC §1911\(d\)](#). However, a judge is not required to defer to a tribal resolution submitted by the parent’s tribe that states that adoption is not in the child’s best interest when the resolution is in direct conflict with California’s strong preference for adoption of dependent children. *In re Laura F.* (2000) 83 CA4th 583, 592–595, 99 CR2d 859 (full faith and credit provision of ICWA does not require judge to apply tribe’s law in violation of state’s legitimate policy).
- A consent for the voluntary termination of parental rights concerning an Indian child must satisfy all statutory requirements ([25 USC §1913](#); [Fam C §8606.5](#)): (1) it cannot be given within 10 days after the birth of the child; (2) it must be in writing and recorded before the judge and accompanied by the judge’s certificate that the terms and consequences of the consent have been fully explained in detail and understood by the parent or Indian custodian; (3) if the parent or Indian custodian does not understand English, the court must certify that the explanation has been interpreted into a language that the parent or Indian custodian

understands; and (4) the consent must provide that the parent may be withdrawn at any time, and that upon withdrawal, the child shall be returned to the parent.

- A judge may not order an involuntary termination of parental rights concerning an Indian child in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. [25 USC §1912\(f\)](#); [Fam C §7892.5](#); [Welf & I C §361.7](#); [Cal Rules of Ct 5.485](#). A qualified expert witness must be a person knowledgeable in the prevailing social and cultural standards of the child's tribe. This witness may be a member of the child's tribe or an expert with substantial experience in the delivery of services to Indians. [25 USC §1912\(e\)](#); [Fam C §177\(a\)](#); [Welf & I C §224.6](#); [Cal Rules of Ct 5.484](#).
- Upon adoption of an Indian child, the clerk of the court is required to send notice to the Secretary of the Interior, and upon turning 18 years of age, an adopted Indian child has the right to learn all information necessary to protect any rights flowing from the individual's tribal relationship. [25 USC §§1917, 1951](#); [Fam C §§9208, 9209](#).
- When an Indian child is the subject of an adoption proceeding, the judge must give preference to a placement with a member of the child's extended family, other members of the child's tribe, or other Indian families, in the absence of good cause to the contrary. [25 USC §1915\(a\)](#); [Fam C §177\(a\)](#); [Welf & I C §361.31](#); [Cal Rules of Ct 5.484\(b\)](#). The child's tribe may adopt another order of preference by resolution. [25 USC §1915\(c\)](#); [Cal Rules of Ct 5.484\(b\)\(4\)](#). Any person involved in the placement of an Indian child must consult with the child's tribe to secure a placement that complies with ICWA preferences. [Cal Rules of Ct 5.482\(g\)](#). Good cause for departing from the placement preferences must be proven by the party requesting deviation and may include considerations such as the requests of the parents or Indian custodian, the request of the Indian child when of sufficient age, the extraordinary physical or emotional needs of the Indian child as established by an expert qualified witness, or the unavailability of suitable families based upon documented diligent effort. [Fam C §177\(a\)](#); [Welf & I C §361.31](#); [Cal Rules of Ct 5.484\(b\)](#).

➤ **JUDICIAL TIP:** Although the tribe has the authority to alter the order of preference, it does not have the authority to designate a

specific placement. *In re Jullian B.* (2000) 82 CA4th 1337, 1345 n3, 99 CR2d 241. If the agency charged with making adoptive placements selects a placement that does not comply with the preferences of the ICWA, it must justify its decision by establishing good cause for refusing to comply with these preferences. 82 CA4th at 1345. This “good cause” provision is designed to give the judge some flexibility in the placement of the child. 82 CA4th at 1346. The agency must search diligently for a placement that complies with the preferences of the ICWA, and may reject a preferred placement only on a showing of good cause. 82 CA4th at 1347. The judge has the responsibility of deciding whether there is good cause to avoid the preferences of the ICWA and to determine a placement that is in the child’s best interest. 82 CA4th at 1350.

4. [§130.108] Time Limit for Asserting Rights Under ICWA

A parent must timely assert his or her rights under the ICWA. See, e.g., *In re N.M.* (2008) 161 CA4th 253, 268–269, 74 CR3d 138 (ICWA violation forfeited in parental rights termination proceedings, even though parents claimed that notices to several tribes were misaddressed, when parents did not raise such objections in the special hearing after remand in which the termination order was reinstated); *In re Derek W.* (1999) 73 CA4th 828, 833–834, 86 CR2d 742.

5. [§130.109] Rehabilitative Efforts Before Termination of Parental Rights

In any involuntary proceeding involving an Indian child, the party seeking the court’s order must provide evidence that “active efforts” were provided for remedial and rehabilitative programs and services to prevent the breakup of the Indian family and that these efforts were unsuccessful. Such efforts must be consistent with the prevailing social and cultural conditions and way of life of the child’s tribe and must use available resources of the extended family, the tribe, and other Indian services. Active efforts include steps necessary to secure tribal membership for a child if the child is eligible for membership in a tribe. 25 USC §1912(d); Fam C §177(a); Welf & I C §361.7; Cal Rules of Ct 5.484(c). See *In re William G.* (2001) 89 CA4th 423, 427–428, 107 CR2d 436 (repeated attempts to notify father of proceedings satisfied ICWA’s requirements; father was aware of opportunity to receive services but declined them); *Letitia V. v Superior Court* (2000) 81 CA4th 1009, 1016–1018, 97 CR2d 303 (sufficient efforts had been made to provide mother with rehabilitative services; court was justified in finding that further efforts would have been

futile). Proof of reasonable rehabilitative efforts and their failure must be shown by clear and convincing evidence; proof beyond a reasonable doubt is not required before parental rights may be terminated. *In re Michael G.* (1998) 63 CA4th 700, 709–712, 74 CR2d 642.

6. [§130.110] Invalidation of Order for Lack of Consent

An adoption order may be overturned at any time within two years of its entry if parental consent was obtained by fraud or duress. 25 USC §1913(d); Fam C §8606.5(c). The child, the Indian parent or custodian, or the child’s tribe may petition a court of competent jurisdiction to invalidate a foster care placement or termination of parental rights on a showing that parental consent was not obtained in accordance with the statutory requirements. 25 USC §1914; Welf & I C §224. If a final decree of adoption is vacated, a parent or prior Indian custodian may petition for return of custody, and the court shall grant that petition unless there is proof that return of custody is not in the best interest of the child. Fam C §8619.5.

7. [§130.111] “Existing Indian Family Doctrine”

Arguably, new state legislation prohibits further use of a judicially created “existing Indian family doctrine” that some courts have relied upon in declining to apply the provisions of the ICWA when neither the child nor the birth parents have a significant social, cultural, or political relationship with an Indian community. Fam C §175; see *In re Santos Y.* (2001) 92 CA4th 1274, 1303–1317, 112 CR2d 692; *In re Derek W.* (1999) 73 CA4th 828, 833, 86 CR2d 742; *In re Alexandria Y.* (1996) 45 CA4th 1483, 1490–1494, 53 CR2d 679; *In re Bridget R.* (1996) 41 CA4th 1483, 1491, 1501, 1507, 1521–1522, 49 CR2d 507 (concluding that ICWA is limited in its application to children who are not only of Indian descent but who also belong to an “existing Indian family”). Other courts have rejected this doctrine. *In re Derek W.*, *supra*, 73 CA4th at 833. They have concluded that the ICWA permits a judge to depart from the statutory preferences when good cause exists to do so (25 USC §1915(a)), without having to rely on a judicially created exception to the ICWA that does not appear in the ICWA. They have also concluded that the doctrine conflicts with the ICWA’s policy of protecting and preserving the interests of Indian tribes in their children and undermines the ICWA’s purpose of establishing uniform federal standards governing the removal of Indian children from their families. *In re Alicia S.* (1998) 65 CA4th 79, 88–92, 76 CR2d 121; *Adoption of Lindsay C.* (1991) 229 CA3d 404, 414–416, 280 CR 194.

8. [§130.112] Requirements Imposed on DSS

The Department of Social Services (DSS) must ensure that birth parents of Indian ancestry who seek to relinquish a child for adoption provide sufficient information so that a certificate of Indian ancestry can be obtained from the Bureau of Indian Affairs. [Fam C §8619](#).

When a parent relinquishes a child for adoption or executes an adoption placement agreement, DSS must ask the child and the child's parent or custodian if the child has an Indian tribe affiliation or any potential Indian tribe affiliation. [Fam C §8620\(a\)\(1\)](#). If there is any oral or written information indicating that the child is, or may be, an Indian child, the DSS must obtain specified information about the child, the child's family, and the Indian tribes or organizations of which the child may be a member. [Fam C §8620\(a\)\(2\)](#).

The DSS must comply with the letter of the ICWA and must make an adequate record of this compliance. *In re H.A.* (2002) 103 CA4th 1206, 1209, 128 CR2d 12. In order to ensure compliance with the ICWA notice requirements, the DSS must (1) complete and serve a Notice of Involuntary Child Custody Proceeding Involving an Indian Child and a copy of the petition, and (2) file with the court copies of proof of the registered mail or certified mail and the return receipt(s), the completed Notice of Involuntary Child Custody Proceeding Involving an Indian Child that was served, and any responses received. 103 CA4th at 1214–1215.

J. [§130.113] Surrogacy Adoptions

In a “traditional surrogacy” arrangement in which the surrogate mother is impregnated with the sperm of the intended father with the prior understanding that the resulting child is to be the legal child of the intended father and his wife, the wife's parental rights must be established in an adoption proceeding. See, e.g., *Marriage of Moschetta* (1994) 25 CA4th 1218, 1221–1222, 30 CR2d 893. An “assisted reproduction agreement” is now statutorily defined to mean a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract. [Fam C §7606](#). For purposes of this proceeding, the surrogate is considered to be the “natural” mother of the child. 25 CA4th at 1222. If the surrogate refuses to consent to the adoption, the adoption may not proceed. 25 CA4th at 1222, 1231. The presumptions of parenthood provided by [Fam C §§7540](#) (see [§130.51](#)) and [7611\(d\)](#) (see [§130.54](#)) may not be applied to establish that the wife of the biological father is the child's mother, because there is no question of biological parenthood to settle. 25 CA4th at 1224–1226.

Surrogacy arising from *in vitro* fertilization (*i.e.*, when the surrogate was artificially inseminated with an embryo created in a laboratory by the egg and sperm of the intended parents) does not involve the adoption process. Instead, the issue of parentage is resolved by bringing an action to determine the existence of a mother-child relationship under Fam C §7650, which is part of the Uniform Parentage Act (UPA). See *Johnson v Calvert* (1993) 5 C4th 84, 88–93, 19 CR2d 494. Although the UPA recognizes both genetic consanguinity and giving birth as means of establishing the mother-child relationship, when these two means do not coincide in one woman, the woman who *intended* to procreate the child is the natural mother under California law. 5 C4th at 93 (judge must determine the parties’ intentions as manifested in the surrogacy agreement in order to resolve the question).

When the surrogacy arises from *in vitro* fertilization in which the egg and sperm are not taken from the prospective parents, these parents are nonetheless the child’s lawful parents (as the initiating parties in the child’s conception and birth) and are therefore liable for support. *Marriage of Buzzanca* (1998) 61 CA4th 1410, 1428–1430, 72 CR2d 280 (supplier of egg and sperm did not come forward to claim the child). The same statute that makes a husband the lawful father of a child conceived as a result of artificial insemination of his wife to which he has consented (Fam C §7613; discussion in §130.53) applies to both intended parents. 61 CA4th at 1418–1421. See *Jaycee B. v Superior Court* (1996) 42 CA4th 718, 732, 49 CR2d 694 (case involving same parties in which appellate court noted “the need for legislation in the surrogacy area”).

In a case in which a child was born to a single woman after a fertility clinic implanted embryos belonging to a husband and wife into her, the court held that the single woman was the child’s mother under Fam C §7610, the husband was the child’s father under Fam C §7630, and the wife lacked standing to bring a parentage action because she had no genetic link with the child as the embryos resulted from an anonymous donor’s eggs that were fertilized with the husband’s sperm. *Robert B. v Susan B.* (2003) 109 CA4th 1109, 1113–1117, 135 CR2d 785.

A husband’s and wife’s action under Fam C §7650 to determine if they are the genetic parents of children born to another couple allegedly as a result of using the genetic materials of the husband and wife that were in the possession of a fertility clinic the husband and wife had engaged in their own efforts to conceive a child is properly dismissed, when there is no admissible evidence suggesting a genetic link between them and the children. *Prato-Morrison v Doe* (2002) 103 CA4th 222, 229–230, 126 CR2d 509. Even if a genetic link is proved, it is within the court’s discretion to dismiss the action if the court finds that dismissal is in the children’s best interests. 103 CA4th at 231–232.

K. Coparent Adoptions

1. [§130.114] Domestic Partners

Under Fam C §§297–299.6, same-sex partners who agree to be responsible for one another’s basic living expenses, share a common residence, and meet other specified requirements may register as domestic partners by filing a Declaration of Domestic Partnership with the Secretary of State. A domestic partner who desires to adopt a child of his or her domestic partner may employ the procedures applicable to stepparent adoptions (see §§130.7, 130.75–130.81). Fam C §9000(b), (f). The consent requirements applicable to stepparent adoptions, *i.e.*, consent by the birth parents and the child if over 12 years of age, also apply to adoption by a domestic partner. See §130.78.

As of January 1, 2005, registered domestic partners have the same legal rights and obligations that are granted to and imposed on spouses. Fam C §297.5(a). Their rights and obligations with respect to a child of either of them are the same as those of spouses beginning on that date. Fam C §297.5(d).

2. [§130.115] Adoption Without Consent of Biological Parent

California’s adoption statutes permit adoption without regard to the marital status of the adoptive parents. *Karen S. v Superior Court* (2003) 31 C4th 417, 433, 438, 2 CR3d 69. In *Karen S.*, the court noted that so-called coparent or second parent adoptions by unmarried persons, which have been approved by the Department of Social Services for many years, can be effective in promoting the fundamental purposes that adoption has always served, *i.e.*, the welfare, protection, and betterment of children. 31 C4th at 436–437. These adoptions can secure the salutary incidents of legally recognized parentage for a child of a nonbiological parent, who otherwise must remain a legal stranger, and also benefit children by providing a clear legal framework for resolving any disputes that may arise over custody and visitation. 31 C4th at 437–438.

The question has arisen in several cases, however, as to whether a nonmarital partner may adopt his or her partner’s child without the partner’s consent. In *Karen S.*, the court approved a second parent adoption of a child by the lesbian partner of the child’s birth mother, even though the birth mother, who had initially consented to the adoption, later attempted to withdraw her consent after the expiration of the statutory deadline for doing so. In such a case, relinquishment of the birth mother’s rights is not essential to the adoption. 31 C4th at 431, 434. The court held that Fam C §8617, which provides that the birth parents of an adopted child have no rights over the child and are relieved of all parental duties to the child, does not prohibit a birth parent and another qualified adult from

jointly waiving the application of the statute in order to coparent a child, nor does it prohibit a court under these circumstances from ordering an otherwise valid adoption. 31 C4th at 429–430, 432, 434. The parties waived the statute in this case when the birth mother signed an adoption consent form stating her intention to retain coparental rights and responsibilities and permitting her lesbian partner to assume coparental rights and responsibilities, and when the latter signed adoption forms clearly stating her intention to accept coparental rights and responsibilities for the child to be shared with the birth mother. 31 C4th at 432. Thus, the court was not prevented by Fam C §8617 from proceeding to a best interests analysis of the adoption petition under Fam C §8612. 31 C4th at 445–446.

Before *Karen S.*, one appellate court noted that it saw nothing to preclude adoption by a same-sex partner who has cared for and helped raise the child while cohabiting with the child's biological parent. It referred to former CC §221, now Fam C §8600, which provides that a minor child may be adopted by any adult. It acknowledged, however, that the validity of such an adoption was not the issue before the court. See *Nancy S. v Michele G.* (1991) 228 CA3d 831, 841 n8, 279 CR 212. Another appellate court criticized the view taken by the court in *Nancy S.* as an attempt to legislate social policy. It suggested that the issue of what rights, if any, a same-sex partner should have with respect to his or her partner's biological child should be decided by the Legislature, not by the courts. See *West v Superior Court* (1997) 59 CA4th 302, 306, 69 CR2d 160.

3. [§130.116] Guardianship

An appellate court has upheld a judge's denial of a guardianship petition filed by a woman who was seeking visitation rights with the children of her former lesbian partner with whom she had previously lived. *Guardianship of Z.C.W.* (1999) 71 CA4th 524, 527–528, 84 CR2d 48. One of the children was almost three years old when the women began living together. The other child was conceived by artificial insemination during the time they lived together. 71 CA4th at 526. The court rejected the petitioner's contention that she was entitled to visitation rights because she was the lesbian de facto parent of the children. It concluded that there is no statutory authority for a limited guardianship providing for visitation rights to a nonparent, and that this issue is one that must be addressed by the Legislature. 71 CA4th at 526–527. It also concluded that although the petitioner exhibited characteristics of a de facto parent during her relationship with her former partner, absent any legislative or case authority granting a nonparent visitation rights over the objection of the

biological parent and in the absence of any showing of detriment to the child, the court could not grant visitation rights. 71 CA4th at 528.

In another case, the appellate court held that the plaintiff's status as a nonparent did not preclude her from filing a guardianship petition concerning a child who was born to the plaintiff's former domestic partner while they were living in the same household as a couple. *Guardianship of Olivia J.* (2000) 84 CA4th 1146, 1152–1162, 101 CR2d 364. However, as a nonparent, she is required to meet a heavy burden before her petition may be granted. 84 CA4th at 1152–1154. She must demonstrate by clear and convincing evidence that parental custody is detrimental to the child. 84 CA4th at 1157. One factor the judge may consider in ruling on the petition is the child's loss of a relationship with the nonparent who acted as a de facto or psychological parent since the child's birth. 84 CA4th at 1159. The court concluded by stating that because of the strong preference for parental custody and the heavy burden a nonparent must carry of demonstrating that parental custody is detrimental to the child, a guardianship petition is an intrusive and limited remedy not easily adapted to achieving the plaintiff's goal, *i.e.*, to protect the child from psychological harm and to maintain her relationship with the child. 84 CA4th at 1161–1162 (court suggests that legislative solution is needed).

4. [§130.117] Contract Between Man and Woman

A contract between a man and a woman in which the woman promises the man parentage, custody, and visitation rights to her child conceived by artificial insemination with an anonymous donor is valid and enforceable to the extent of an action for unjust enrichment, even though the man does not qualify as either a presumed father or a natural father of the child under the Uniform Parentage Act (Fam C §§7600–7730). An “assisted reproduction agreement” is now statutorily defined to mean a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract. Fam C §7606. *Dunkin v Boskey* (2000) 82 CA4th 171, 183–195, 98 CR2d 44. Even though the man had received the child into his home and openly acknowledged her as his child, he was not a “presumed father” under Fam C §7611(d) because he had no biological link with the child. 82 CA4th at 186. A child conceived by artificial insemination with an anonymous donor also does not have a “natural father.” 82 CA4th at 186. Because the man was not the woman's husband, he did not fall within the scope and protections of Fam C §7613, but was deemed to be a “lawful father” by virtue of his written consent to the woman's artificial insemination and voluntary consequent assumption of fatherhood duties. 82 CA4th at 188, 190. Although the contract cannot grant the man parental rights that the

law otherwise expressly denies to him, infringe on the court's authority to provide for the appropriate custody and support of the child, or abridge the child's rights, it is binding on the parties. 82 CA4th at 190. The man is precluded, on public policy grounds, from recovering general damages for emotional harm resulting from the woman's breach of the contract, but may recover special damages for readily ascertainable economic loss under an unjust enrichment theory, which is synonymous with restitution. 82 CA4th at 195, 198.

L. Judge's Authority To Vacate Adoption Order

1. [§130.118] In General

An action or proceeding of any kind to vacate, set aside, or otherwise nullify an adoption order on any ground, except fraud, must be filed within one year after entry of the order. Fam C §9102(a). Any action based on fraud must be filed within three years after entry of the order. Fam C §9102(b). A judge may vacate an adoption order on the same grounds on which the judge is entitled to vacate any other order or decree, e.g., for fraud, mistake, inadvertence, surprise, or excusable neglect. *Adoption of Kay C.* (1991) 228 CA3d 741, 751, 278 CR 907. A judge may also vacate an adoption order on finding that termination of the adoption is in the child's best interest. See *Adoption of Jason R.* (1979) 88 CA3d 11, 17, 151 CR 501.

A stepparent adoption is not invalidated by nullification of the parents' marriage. A stepparent who wishes to terminate his or her parental relationship with the child of the stepparent's former spouse must seek a court order terminating the adoption. 88 CA3d at 16–17.

2. Based on Child's Developmental Disability or Mental Illness

a. [§130.119] Grounds for Setting Aside Order

A judge may set aside an adoption order if the following facts are proved to the judge's satisfaction: (1) the child shows evidence of a developmental disability or mental illness because of conditions that existed before the adoption, (2) the parents had no knowledge or notice of these conditions before entry of the order, and (3) the child cannot be relinquished to an adoption agency because the child is considered unadoptable. Fam C §9100(a). See *Adoption of Katherine A.* (1982) 135 CA3d 200, 204, 185 CR 101 (judge must expressly find that child is unadoptable). The constitutionality of this statute has been upheld. See *Adoption of Kay C.* (1991) 228 CA3d 741, 747–757, 278 CR 907.

b. [§130.120] Petition Requirements

A petition to set aside an adoption must be filed within five years after entry of the adoption order. [Fam C §9100\(b\)](#). The petition may be filed by one adoptive parent, leaving the parent-child relationship to continue with respect to the other adoptive parent; however, the other parent is an indispensable party in the proceeding. *Department of Social Welfare v Superior Court* (1969) 1 C3d 1, 4–6, 81 CR 345.

The clerk must immediately notify the DSS in Sacramento of the petition, and within 60 days after notice, the DSS must file a full report with the court and must appear before the court to represent the child. [Fam C §9100\(c\)](#).

c. [§130.121] Factors To Consider

A judge may deny the petition even if all the statutory requirements for relief are shown. See [Fam C §9100\(a\)](#). Factors the judge should consider include the following: (1) the child's welfare; (2) the extent, nature, duration, and prognosis of the disability; (3) the degree of dependency; (4) the duration of the adoption; and (5) the bonds of affection or attachment between the child and the adoptive parents. *Adoption of Kay C.* (1991) 228 CA3d 741, 752, 278 CR 907. If only one adoptive parent petitions for relief, the judge should also consider the effect of any dissolution of the parents' marriage, the sources of support for the child available to the nonpetitioning parent, and that parent's ability to meet the child's needs. *Department of Social Welfare v Superior Court* (1969) 1 C3d 1, 6, 81 CR 345.

d. [§130.122] Further Action To Be Taken If Order Is Set Aside

If the judge sets aside the adoption order, the judge must direct the district attorney, county counsel, or county welfare department to take appropriate action under the Welfare and Institutions Code to have the child declared a dependent of the juvenile court. [Fam C §9101\(a\)](#). The judge may also make an order for the child's care, custody, or confinement pending the proceeding. [Fam C §9101\(a\)](#). The county in which the adoption proceeding was conducted is liable for the child's support until the child is able to provide for his or her own support. [Fam C §9101\(b\)](#). The granting of the petition does not reestablish the birth parents' parental rights. See *In re Randi D.* (1989) 209 CA3d 624, 627–628, 257 CR 421.

M. Adoptions of Adults and Married Minors

1. [§130.123] Eligibility To Adopt

An adult or married minor may be adopted by any other older adult, including a stepparent. [Fam C §§9300, 9320\(a\)](#). There is no specified age differential. See [Fam C §9320](#). A person may not adopt his or her spouse. [Fam C §9320\(a\)](#).

A person may not adopt more than one unrelated adult within one year of his or her adoption of another unrelated adult, unless the proposed adoptee is the biological sibling of the previous adoptee, or is disabled or physically handicapped. [Fam C §9303\(a\)](#). In addition, a person may not adopt an unrelated adult within one year of the adoption of another adult by the person's spouse, unless the proposed adoptee is a biological sibling of the previous adoptee. [Fam C §9303\(b\)](#).

2. [§130.124] Consent Requirements

Consent to the adoption is required by:

- The adoptive parent's spouse. [Fam C §9301](#).
- The proposed adoptee's spouse. [Fam C §9302\(a\)](#).

The consent of the proposed adoptee's parents, of the DSS, or of any other person is not required. [Fam C §9302\(b\)](#).

3. [§130.125] Adoption Agreement and Petition

An adult adoption is initiated by an adoption agreement, executed by the prospective adoptive parent and the proposed adoptee, which must state that the parties agree to assume the legal relationship of parent and child, and to have all the rights and be subject to all the duties and responsibilities of that relationship. [Fam C §9320\(b\)](#).

Thereafter, the prospective adoptive parent and the proposed adoptee must file a petition for approval of the adoption agreement in the superior court for the county in which either of them resides. [Fam C §§200, 9321\(a\)](#). The petition must specify the following ([Fam C §9321\(b\)](#)):

- The length and nature of their relationship,
- Their degree of kinship,
- The reason the adoption is sought,
- Why the adoption is in their best interest and that of the public,
- The names and addresses of the proposed adoptee's birth parents (if living) or adult children, and
- Any prior adult adoptions by the prospective adoptive parent or his or her spouse.

4. [§130.126] Investigation and Report

In general, no investigation or report to the court by any public agency concerning the proposed adoption is required. However, a judge may require the county probation officer or the DSS to investigate the circumstances of the proposed adoption and to render a report and recommendation to the judge before the hearing. [Fam C §9325](#).

If the prospective adoptive parent is a provider of board and care, treatment, habilitation, or other services to persons with developmental disabilities, or is a spouse or employee of a provider, and seeks to adopt an unrelated adult with developmental disabilities, the regional center for the developmentally disabled must file a written report with the court concerning (1) the suitability of the proposed adoption in meeting the proposed adoptee's needs, and (2) any known prior adoption by the prospective adoptive parent. [Fam C §9327](#).

5. [§130.127] Notice of Hearing

When the petition is filed, the clerk must set the matter for hearing. [Fam C §9322](#). There are no specific notice requirements for an adult adoption, except in the case of an adoption of a developmentally disabled adult. See [Fam C §9326](#). A judge may require notice of the time and place of the hearing to be served on any interested person, who may appear and object to the proposed adoption. [Fam C §9323](#). There is no statutory definition of "interested person."

If the proposed adoptee is an adult with developmental disabilities and the prospective adoptive parent is a provider of board and care, treatment, habilitation, or other services to persons with such disabilities (or is a spouse or employee of a provider), the prospective adoptive parent must serve notice of the hearing and a copy of the petition on the director of the regional center for the developmentally disabled and on any living birth parents or adult children of the proposed adoptee. [Fam C §9326](#). Service must be made by mail or personal delivery at least 30 days before the hearing on the adoption petition. [Fam C §9326](#).

6. [§130.128] Hearing and Order

The hearing on the adoption petition may, in the judge's discretion, be open to the public. [Fam C §9307](#). Both the prospective adoptive parent and the proposed adoptee must attend the hearing in person, unless an appearance is impossible, in which case an appearance may be made by counsel. [Fam C §9324](#).

The judge must examine the parties or the counsel of any party who is not present in person ([Fam C §9328\(a\)](#)), and may consider any oral or

written evidence, whether or not it is in conformity with the Evidence Code (Fam C §9328(c)).

If the judge is satisfied that the adoption is in the best interests of the parties and in the public interest, and that there is no reason why the petition should not be granted, the judge must approve the adoption agreement and enter an order of adoption declaring that the person adopted is the child of the adoptive parent. Fam C §9328(b). Otherwise, the judge must withhold approval of the agreement and deny the petition (Fam C §9328(b)), *e.g.*, if a party's consent to the adoption was procured by fraud, coercion, or undue influence (see, *e.g.*, *Adoption of Sewall* (1966) 242 CA2d 208, 218–222, 51 CR 367), or if the proposed adoptee is attempting to evade his or her duty to support an indigent natural parent (see Fam C §§4400–4401).

7. [§130.129] Effect of Adoption

After adoption, the adoptee and the adoptive parents have the legal relationship of parent and child, with all the rights and duties of that relationship. Fam C §9305. The adoptee may take the adoptive parents' family name. Fam C §9304.

The adoptee's birth parents are relieved of all parental duties towards, and all responsibility for, the adoptee, and have no right over the adoptee. Fam C §9306(a). When an adult is adopted by the spouse of a birth parent, the birth parent's rights and responsibilities are not affected by the adoption. Fam C §9306(b).

8. [§130.130] Termination of Adoption

Any adult who has been adopted may file a petition to terminate the parent-child relationship on written notice to the adoptive parent. Fam C §9340(a). If the adoptive parent consents in writing to the termination, the judge may issue an order terminating the parent-child relationship without further notice. Fam C §9340(b). If the parent does not consent, he or she must file a written response to the petition within 30 days of the date notice of the petition is mailed, and the matter must be set for hearing. The judge has discretion to require an investigation by the county probation officer or the DSS. Fam C §9340(c).

IV. SAMPLE FORMS

A. [§130.131] Written Form: Decree of Adoption

The petition of [*names of petitioners*] for adoption of the minor child who is the subject of the above-entitled proceeding came on regularly for hearing on [*date*] in Department No. _____ before the Hon. [*name*].

Petitioners appeared in person and through their attorney, [*name*].

[Optional]

The child appeared in person.

The court separately examined each petitioner [*and the child*], and received both oral and documentary evidence.

THE COURT HEREBY FINDS THAT:

The representations in the petition are true; petitioners are husband and wife and are residents of [*county*], California; each of them is an adult and at least ten years older than the child.

The child who is the subject of the petition is a [*male/female*] child born on [*date*], in [*place of birth*]. [*The child's name as shown on the original birth certificate was _____.*]

[*If a stepparent adoption*]

The child's [*mother/father*] has sole legal and physical custody of the child. [*Name of petitioner's spouse*] will consent to petitioner's adoption and will retain all [*his/her*] parental rights.

The consent of the birth [*father/mother*] to this adoption [*has been given/is not needed*] because for over one year beginning on [*date*], [*he/she*] has willfully failed to communicate with the child and to pay for [*his/her*] care, support, and education although able to do so.

Petitioner is able to care for, support, and educate the child and to treat [*him/her*] as if [*he/she*] were [*his/her*] natural child.

[*If an agency adoption*]

The court has read and considered the petition for adoption on file in this matter as well as the written report previously filed in this matter by the [*name of county adoption agency*], which recommends that the adoption petition be [*granted/denied*].

[*If independent adoption*]

The child was placed with the petitioners for adoption by [*specify, e.g., his birth mother*] on [*date*].

[*If agency or independent adoption*]

The petitioners have previously filed an accounting report with the court on [*date*].

[*If postadoption contact agreement*]

A postadoption contact agreement under [Fam C §8616.5](#) has been submitted and has been attached to the adoption petition. Petitioners are relatives of the child in the following respects: *[Specify]*.

[If juvenile proceedings are pending or child is dependent of juvenile court]

The child is *[a dependent of the juvenile court/the subject of juvenile court proceedings]*. *[He/she]* was represented by counsel in the juvenile court.

[If appropriate]

The birth mother of the child whose name is set forth in the petition for adoption has given her written consent to this adoption in the manner required by law.

[Or]

The birth mother's parental rights have been terminated by *[specify]*.

[If appropriate]

The parental rights of the birth father of the child, whose name is set forth in the petition for adoption, were previously *[relinquished/terminated]* by an order of this court made on *[date]* in a proceeding brought under *[the [Uniform Parentage Act/Family Code section 7660/Welfare and Institutions Code section 366.26/Family Code section 7820 et seq/](#) specify other]*.

The petitioners have executed in the presence of the court their agreement that the child shall be adopted and treated in all respects as their own lawful child.

[The interests and welfare of the child will be promoted by the proposed adoption/The postadoption contact agreement is in the child's best interest], and the petition should be granted.

IT IS THEREFORE ORDERED THAT:

The petition for adoption is granted.

[If appropriate]

The parental rights of the birth mother and father are terminated.

The child is now the adopted child of petitioners *[names of petitioners]*, and shall be regarded and treated in all respects as their own lawful child.

Both petitioners have the legal relation of parent and child with respect to the child, with all the rights and subject to all the duties of that relation, and

The child shall hereafter be known by [*his/her*] adopted name, [*name*].

B. [§130.132] Script: Verbal Adoption Agreement

Do you [*name(s) of petitioner(s)*] understand that if the court signs the order making you the legal [*father/mother/parents*] of [*child's name*], you will have all the rights and obligations toward [*him/her*] as if [*he/she*] were your natural child?

Do you understand that you will have the right and obligation to love [*him/her*], care for [*him/her*], and support [*him/her*] both financially and emotionally, and act in all respects as a legal parent?

V. [§130.133] ADDITIONAL REFERENCES

10 Witkin, Summary of California Law, *Parent and Child* §§70–156 (10th ed 2005).

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